



**M. A. POLITICAL SCIENCE**  
**(Volume II)**

*By*

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**&**

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*TO BE HAD OF :*

**HOUSE OF BOOKS**

**72, MAHATMA GANDHI ROAD**  
**CALCUTTA-9**

**Published by  
P. Bhattacharjee  
Pampa Prakashani  
8, Pataldanga Street  
Calcutta-9**

**Printed by  
Byomkes Majumdar  
Free India Press  
1, Gangadhar Babu Lane  
Calcutta-12**

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**COMPARATIVE  
FEDERAL CONSTITUTIONS**

[ INDIA : CANADA : U. S. A. : U. S. S. R. :  
SWITZERLAND ]



## COMPARATIVE FEDERAL CONSTITUTIONS

*Q. What are the objects, scope and significance of the preamble to the Constitution of India? Is membership of the Commonwealth consistent with India's Sovereign Democratic status?*

**Ans.** In modern times, it has become customary, following the example of the United States, for written constitutions to be preceded by a preamble. Among recently made constitutions, such preambles are to be found in those of India, Ireland, Burma, Japan, etc., the constitution of the Soviet Union having no preamble.

Broadly it may be said that the purpose of the preamble to any law is to express the wish and intention of the body making the law. The same may be said of a constitution and then the function of the preamble becomes to serve as an expression of the wishes, intentions, ideals and aspirations of the framers of the constitution. (As Justice Story puts it, the importance of examining the preamble, for the purpose of expounding the language of a statute has been long felt, and universally conceded in all juridical discussion. It is an admitted maxim in the ordinary course of administration of justice that the preamble of a statute is a key to open the mind of the makers, as to mischiefs which are to be remedied and the objects which are to be accomplished,

by the provisions of the statute ..... There does not seem any reason why, in a fundamental law or constitution of government, an equal attention should not be given to intention of the framers, as stated in the preamble.¶ Thus, it may not be too much to say that the preamble makes clear in a nutshell the philosophy of a constitution and the preamble may rightly be looked upon as the proper yardstick for measuring the worth of the constitution.

But at the same time, it must be remembered that the preamble is not regarded as an integral part of the operative portion of the constitution inasmuch as the government or its different branches do not derive any of their substantive powers from it which is taken into consideration for ascertaining the extent and purpose of any constitutional provision only when there is any doubt or ambiguity. In other words, "as it states or professes to state, the general object or intention of the legislature in passing the enactment, it may legitimately be consulted to solve any ambiguity or to fix the meaning of words which may have more than one, or to keep the effects of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt," but cannot be allowed to control the express provisions of the constitution.

Now, as regards what a preamble should be like, there seems to be two broad schools of opinion. One school holds that since the constitution is the basic law governing the entire political life of a people, its preamble should rightly make clear the philosophy of the constitution in a manner and language suited to rousing

the enthusiasm and respect and loyalty of the people. But the other school holds that "a constitution is a legal document. It is intended to state supreme rules of law. It should confine itself to stating rules of law, not opinions, aspirations, directives and politics." Without going into the respective merits and otherwise of these opinions, it may be pointed out that a constitution is, as Aristotle says, a way of life a people has chosen for itself and their loyalty and allegiance to it is naturally dependent on its ability to help them in the realisation of the ideals they have set before themselves.

Coming to an examination of the nature and significance of the preamble to the Indian Constitution, we find the whole thing well worth quoting in full. It runs as follows : "We, the people of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic and to secure to all its citizens justice, social, economic and political ; liberty, of thought, expression, belief, faith and worship ; equality, of status and of opportunity and to promote among them all fraternity, assuring the dignity of the individual and the unity of the nation ; in our Constituent Assembly this twentieth day of November, 1949, do hereby adopt, enact and give to ourselves this Constitution."

First, what is the significance of the expression "we, the people of India" ? In this respect also, the United States, can claim to be pioneer and this expression "we the people" is also to be found in many other modern democratic constitutions. Simply stated, this expression means "the government proceeds directly from the people ; is ordained and established in the name of the

people ; its powers are granted by them, and are to be exercised directly on them, and for their benefit." Some critics point out that the members of the Indian Constituent Assembly were not directly elected by the people and as such anything done by them cannot be rightly regarded as done in the name of and on behalf of the Indian people. But while there is some force in this argument, it seems an adequate answer is provided by Dr. S. P. Mukherjee when he says "If you look at the preamble, you will see that it was not a particular political party that passed the Constitution. We took upon ourselves the enormous privilege of describing ourselves as the people of India who met, sat and discussed for months and years and then gave a Constitution to the Country. That was just as it should have been." In other words, the Constitution of India may justly be looked upon as the handiwork of the Indian people in its collective capacity. As a result, the Union of India, though divided into different States for administrative convenience, is an indestructible union with no right to secede on the part of the States.

Secondly, we turn to the phrase, Sovereign Democratic Republic. The meaning of Sovereign is clear enough ; it means full independence, externally and internally. But a few words in explanation of Democratic Republic are necessary. The word republic simply means a State in which there is no hereditary monarchy. But it can be either democratic or undemocratic. And democracy may be said to involve four principal things : first, people, not a legalised monarch or class, are the source of all political power. The people or those

eligible by the law of the land directly choose the principal agents of government, and through their agents, indirectly, all other persons who have political power over life and property ; second, through agents chosen by the voters, all laws are made ; third, at fixed periods, all chief agents of government, at least legislative and executive, must either retire or if they seek continuance in power, submit themselves and their actions to the review at the polls ; fourth, in this process, all voters are equal, that is, each one without regard to intellectuals, moral or economic qualifications, has one vote and in elections, as a rule, the candidate who receives the highest number of votes, is elected. In short, democracy logically signifies equality in voting power, equality in the right to seek and hold office, and majority rule in election. But this is democracy in its political aspect only and since democracy is neither complete nor enduring unless extended to the social and economic life, it may well be that the word democratic used in the preamble has to do more with the latter than with the former. And such an assumption tends to be corroborated by the purposes of the Constitution, as set forth in the preamble, to secure justice, liberty, equality and fraternity.

modern democratic community needs liberty as equality. But there is a great need of fraternity. Fraternity means a sense of common brotherhood and this sense of brotherhood alone can reconcile liberty and equality which have a tendency to quarrel. And justice, again, may be regarded as the basic principle underlying all social relations organised on the basis of liberty,



equality and fraternity which really cannot co-exist without recognising some limit of justice. So, in a word, we may say that the purpose of the Constitution, as set forth in these lines of the preamble, is to create a community characterised by these high principles, a community which is democratic in all its aspects.

Finally, there is another point to be settled. Some have said that India's continued membership of the Commonwealth means a limitation on her sovereign status. But both theoretical and practical arguments can be given to show the untenability of such a view. In the first place, India with the new Constitution adopted, declared herself a republic, and with that declaration, "the Crown of England ceased to have any legal or constitutional authority over India and no citizen of India was to have any allegiance to the British crown." But even as a republic, India decided to continue her membership of the Commonwealth which itself, as a result, has undergone a change of conception through that decision. The Commonwealth has now become a free association of independent nations and India's decision to remain within it is simply an agreement by free will, to be terminated by free will, in no way hampering her freedom of action. Again, sovereignty is essentially a question of fact and judged thus, there is absolutely nothing to show that Commonwealth membership means a limitation on sovereignty.

**2.Q.** *Discuss the distribution of legislative powers between the Union and the State in India. Do you think that the scheme of distribution is likely to cause apoplexy at the centre and acmemia at the extremities ?*

**Ans.** Distribution of power between the union and the units may well be regarded as the *sine qua non* of a federal system. This may take different forms accordingly as different principles are followed, time, place and circumstances being the determining factors. And on these may depend the nature and extent of federalism of a particular constitution. Accordingly, in spite of the Indian Constitution showing a rather high degree of centralising bias, the basic fact of an essentially federal system as based on a constitutional division of power between two parallel sets of government cannot be denied. Despite the presence of rather too many agencies and devices through which the union can exercise control over the units, the fact remains that under the Constitution the States are not mere delegates of the union and the powers of both must be exercised under some limitations, coming from a common source, the Constitution itself. This distribution of power, again, proceeds along two lines "the territory over which the Federation and the units shall, respectively have their jurisdiction and the subjects to which their respective jurisdictions shall extend." The Constitution of India naturally follows those lines and the arrangement under it is as follows : The territory to which the jurisdiction of a State extends is naturally limited to its own boundaries while the union is not so limited. Thus the union enjoys a jurisdiction over the entire territory of the Union of India though its power is subject to certain constitutional limitations.

As regards the distribution of legislative powers the Constitution of India continues the three-fold division

made by the Government of India Act, 1935. All the possible subjects of legislation are divided into three lists, the Union List, the State List and the Concurrent List. The Union List contains 97 subjects and its name is an indication that it is a list of the subjects over which the union will have exclusive legislative jurisdiction. It includes subjects like defence, foreign affairs, communication, currency and coinage, etc.

The State List is one of 65 subjects over which the States will enjoy exclusive legislative jurisdiction. It contains subjects like public order and police, local government, agriculture, education, etc.

And the Concurrent List contains 17 items over which legislative jurisdiction will be shared by the union and the units. This list contains subjects like criminal law and procedure, marriage, insurance, economic planning, etc. Under this list, it is provided that in a case of conflict between a State law and a Union law, the former will be void and the latter valid.

As regards the residual power, the Indian Constitution follows that of Canada and vests the residual power with the union. In this connection, it may be pointed out that the scope of the fully enumerated powers of the union is so great and usually the courts interpret them so liberally since the coming into force of the Constitution up to the present there has not been any case of exercise of the residual power by the union. Also, the Constitution provides for a great expansion in the power of the union by saying that the Union Parliament can make law on State subjects if (i) the Rajya Sabha passes a resolution by a majority of two-

thirds of its members present and voting, declaring that it is necessary in the national interest for the Union Parliament to legislate on a subject even though it is a State subject ; (ii) a proclamation of emergency made by the President is in operation ; (iii) two or more States by agreement between themselves request the Union Parliament to make law on a subject which falls within the jurisdiction of the State. Also, Parliament has the power to make law on any subject "for the purpose of implementing treaties or international agreements and conventions."

This scheme of distribution of legislative powers under the Indian Constitution may be criticised on many grounds. Some of the more important points of criticism may be put as follows. First, the arrangement made by the Indian Constitution may be said to be a little cumbersome. This charge may be supported thus. There are two broad ways in which division of power between the union and the units may be made. One is to give certain specific powers to the union and leave the rest to the units. This has been the method followed by the United States, Australia Switzerland and the Soviet Union. And the other is to give to certain specific powers to the units and leave the rest to the union. This has been the method followed by Canada. Indian Constitution does not follow either of these two wholly, takes something from both and the result is naturally a little more complicated.

Secondly, the entire scheme of distribution of power between the units and the union in India is basically bent upon securing a union which is so much stronger

than the units that according to some, its federal character is compromised and Prof. Wheare at least is not prepared to regard it as more than quasi-federal. And this again given rise to the charge that the arrangement made by the Indian Constitution will produce apoplexy at the centre and acmemia at the extremities. The basic defence against such a charge, however, is that the scheme of distribution of power or even the constitution itself must be ultimately a reflection of the exigencies of circumstances in which it comes to be made. And to any student of Indian affairs, the grim circumstances preceding and following the making of the Constitution are sufficient to justify or at least to explain the framers anxiety to secure a strong union.

Thirdly, making of three lists of subjects is also criticised by some. Prof. Wheare says, "it is, indeed, difficult enough to interpret one list of subjects consistently, when a second or even a third is added, the task of the courts becomes most complicated and confused." And that this charge is not wholly to be ignored is shown by the experiences of Canada as well as of India during the regime of the Government of India Act, 1935. In fact, the three existing lists of subjects under the Indian Constitution can be seen to be descending directly from the scheme adopted in the Government of India Act, 1935. Nevertheless, "experience has shown, both in India and elsewhere, that there are certain matters which cannot be allocated exclusively either to a Central or to a Provincial Legislature, and for which, though it is often desirable that provincial legislation should make provision, it is

equally necessary that the Central Legislature should also have a legislative jurisdiction, to enable it in some cases to secure uniformity in the main principles of law throughout the country, in order to guide and encourage provincial effort, and in others again to provide for mischiefs arising in the provincial sphere but extending or liable to extend beyond the boundaries of a single province."

To conclude, as regards the charge that the union has been made much too strong, the truth of it can hardly be denied. But there are two considerations to be taken into account before condemning the whole thing in a sweeping manner. First, "centralising tendencies have been important in almost every democratic society in this century. Central governments have taken an increasing share of national resources for their traditional function of defence. Central governments have also acquired new functions, as government regulation of and intervention in the economy has grown, as the central governments have proved more effective regulators than the local ones; and, not least important, as the central governments have proved much more effective tax collectors. ....strands of functional union are crossing lines of geographical subdivision in increasing numbers, knitting national societies closely together." That is to say, what is happening in India is happening nearly everywhere. And secondly, in theory the union is without doubt much stronger than the States, but what of practice? In practice, at least since the death of Jawaharlal Nehru, the tendency unmistakably is towards the States more and more asserting themselves and plenty of instances can be

given where important policies laid down by the union have been really sabotaged by the States. Thus in practice, inevitably political considerations are bound to be more important than mere legal or even constitutional ones and the personalities involved are also an important factor. So the least that can be said is that matters in real life are not nearly as neat and clear cut as in theory and hence judgment is difficult.

*Q. "India is a unitary State with subsidiary federal features rather than a federal State with subsidiary unitary features."—Discuss.*

*Ans.* The Constitution of India, though essentially establishing a federal structure, does not use the term federation. According to Dr. Ambedkar, the chief architect of the Constitution, the language of Article 1, describing India as a union of States, has two advantages in that it indicates that the Indian federation is not the result of an agreement by the units and that the component units have no right to secede from the union. While these are without doubt sound considerations, they do not, however, by themselves establish the claim to federalism. For that an examination of the salient features of the Indian Constitution in terms of the usual requirements of a federal structure will have to be made.

Before we begin such an examination, one or two things must be made clear. There is, firstly, no universally accepted definition of a federation. Secondly, the constitution of the U. S. A. is usually taken as a model in this respect. But since the United States' Constitution was framed and adopted, there have been many other

constitutions which are accepted as belonging to the federal category but which depart widely from the model. Also it may be asked whether there is any federal constitution which complies wholly with the federal principle in theory as well as in practice. Even in the U. S. A. and Switzerland, the two cases approaching the federal model most closely, certain strong tendencies are in operation which largely subvert their federal character, in practice if not in form. Thus federalism also like most other things in life must be accepted as a matter of more or less and due allowance must be made for the special circumstances in every case. And in that light, it becomes understandable that federalism in recent years tends to be regarded more as a functional than as an institutional concept having certain characteristics, and such a functional view gains added strength from the manifest consideration that "institutions are not the same thing in different social and cultural environments."

Now, coming to the basic features of a federal system, which generally command common acceptance, these must be set forth as follows. First, there will be two parallel sets of government, one at the national or federal level and the other at the level of the States. Secondly, power is to be divided or distributed between those two sets of government each of which will have thus a sphere of its own in which it can function without let or hindrance from the other. Thirdly, the distribution of power is effected through the instrumentality of a constitution which is written, rigid and accepted as the supreme law of the land. Fourthly, the supremacy of



the constitution necessitates the existence of a special court to function as the interpreter and guardian of the constitution. All these features characteristic of a federation are present in the Indian Constitution which nevertheless differs from a typical federation in some very important respects. These may be described as follows.

First, a federation like United States is formed through the coming together of some independent States and putting some of their powers in common custody. But besides this process called federation by aggregation, there may be federation by disaggregation also as shown by the example of Canada where unitary State is converted into a federal State, the provinces being given the status of the States in a federation. In India also the latter process was followed, the federal principle being first introduced by the Government of India Act, 1935 which provided the structural model for the new constitution. But a federation coming into existence through the transformation of a previously unitary State is as much entitled to be called federal as one coming into existence through aggregation of previously sovereign States.

Second, Indian federation differs from a typical federation like the United States in respect of the position of the States also, and that for easily understandable reasons. In the United States, since, the units were previously sovereign States, naturally they took steps, in making the constitution, for safeguarding and keeping to themselves as much of their powers as was practicable. But here in India, circumstances were wholly different,

the units never having enjoyed any semblance of sovereignty. Thus it is no wonder that corresponding safeguards regarding State rights are not to be found here. This also explains many other things such as vesting of the residuary powers in the union ; the Constitution laying down the constitution of the States also ; a major role being given to the union in the amendment of the Constitution ; the power of the union over the States in both executive and legislative spheres, exercised through the President's power of appointing the Governor of a State, and of disallowing of a State law, etc.

Third, the Indian Constitution also creates what may be described as an indestructible union and it also like that of the U. S. A., does not recognise the right to secede on the part of the States. But whereas in the U. S. A. the federal government does not possess the power to redraw the map of the country without the consent of the legislature of the State or States concerned, the Indian Constitution empowers the Indian government to reorganise the States and alter their boundaries by a simple majority in the ordinary process of legislation without any need or obligation for consulting the State legislatures concerned.

Fourth, the Indian federation not being the fruit of an agreement between sovereign States does not guarantee any equality of the component units, which, however, is a cardinal principle in the United States' Constitution reflected in the equal representation of each State in the Senate. Thus it may be said that in the Indian Constitution we do not find any provision for safeguarding

the interests of the smaller States from being overridden by the combined weight of the larger and more populous States.

Fifth, the constitution of the U. S. A., true to the federal principle in its entirety, establishes what may be called a truly dual polity, with dual systems of officials, rights, citizenship, and courts. But in India, while there are two sets of executive and legislature, the judicial system and the citizenship have been unified together with unification in the machinery of election, accounts and audit.

Sixth, the Constitution provides both for normal circumstances and for emergencies. During emergencies to be proclaimed by the President, the Union government has been given ample power to run the country in a truly unitary manner. But even apart from any emergency, even during normal times, the power given to the Union government is so great in extent and character that it seriously upsets the balance between the Union and the States which some say is essential to the federal system. The Union government has not only a formidable union list and a concurrent list of powers, it also can easily encroach upon the State list of powers whenever necessary in the national interest. Again, the Union government has the power to issue directives upon the State governments for ensuring due compliance with its executive and legislative actions and has also the power of superseding any State government on the ground of the latter's failure to ensure such compliance or refusal to do so.

From all this, it is manifest that in the Indian Consti-

tution while there are the basic features of a federal system, there are at the same time certain features which are not federal but unitary. The existence and strength of these unitary features cannot be denied and it is this that makes Prof. Wheare to describe it as a constitution essentially unitary with certain subsidiary federal features. But there are others who do not share the view. Prof. Alexandrowicz, for example, says Indian federation is a class by itself. Prof. D. N. Banerjee describes it as a federal constitution with a very strong unitary bias. But all these verbal quibblings turning mainly on the particular use of word. So the best thing perhaps is to say that the Indian Constitution exhibits a co-existence of the basic federal features with some unitary feature, that there is no reason for not calling it a federal constitution, that its character is basically a matter not more of practice than of theory.

In practice, again, we find developments have been such as to render any clear cut judgment very difficult inasmuch as forces may be identified which go to strengthen the unitary tendency and also forces favouring the federal character are there. There is the federal system working smoothly but in a country dedicated to economic planning on a vast scale, the Union has inevitably to provide direction and leadership for co-ordinated efforts and its role becomes much greater in view of the patent failure of the States as well as private business to play their expected role in terms of finance as well efforts.

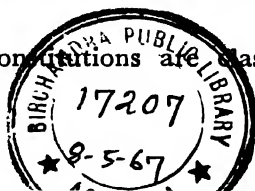
On the other hand, Paul Appleby, the American specialist in public administration has pointed out that

the Union government has relied on the States for a large part of its administration. In fields like development, planning and education, the Union has had to rely on the States to carry on policy and often it has countered stubborn resistance or reluctance to act. Reorganising the political map of the country along linguistic lines has probably weakened a major threat to national unity but clearly the stresses resulting from frustrated linguistic feelings are still there and great. And Appleby finds great danger in all these.

Under the circumstances, the centralising tendencies of the Indian Constitution are not surprising. Also, it may be said that India merely presents one of the most extreme manifestations of centralisation in a democratic State, a tendency to be found all the world over undermining the federal principle even in well established federations. But from a practical point of view, the more important question is whether the combination of federal and unitary features is an advantage or a disadvantage. To an adherent of either pure federalism or pure unitarianism, it is certainly not an advantage. But if we cast aside such theoretical preoccupations, it may be that, after all, it is a great advantage in that the constitution can be run along either line as needs and circumstances dictate.

**A. Q.** *"The method of amendment provided by the Constitution of India strikes a just balance between flexibility and rigidity. It provides a variety of amending processes."*—Setalvad.  
**Discuss.**

**Ans.** Generally constitutions are classified as rigid



and flexible and federal constitutions are usually made rigid by the provision of a special procedure for amendment. This is considered by some to be an essential feature of a federal constitution as it, for example, obtains in the United States. But the difficulty of amending the constitution in the United States, is notorious and in any case the need for a process of amendment which makes possible smooth adaptation to changing needs and circumstances is apparent. Thus it is no wonder that the authors of the Indian constitutions have introduced an element of flexibility into a written federal constitution which naturally has some rigidity. At the same time the flexibility introduced is not so great as in the United Kingdom. Thus it is seen that in this regard, the Indian Constitution strikes a middle path between the constitutions of the United Kingdom and the U. S. A. by providing a method of amendment which is partly rigid and partly flexible.

Article 360 of the Constitution describes the method of amendment. Three different types of processes are provided. First, for amending certain provisions, a legislation by Parliament by simple majority is enough. Secondly, for certain other provisions, not simple but a special majority, that is, two-thirds majority of those present and voting as well as a total membership in each House is required. And thirdly, there are certain other provisions for which the process of amendment is a little more difficult. In this case, the proposed amendment has to be supported by a two-thirds majority of those present and voting as well as a majority of total

membership in both Houses of Parliament and then ratified by at least half of all the State legislatures.

Creation of new States or reorganisation of the existing States, creation or abolition of second chambers in the States, etc. are matters in which Parliament can amend the constitution by a simple majority. Matters like the election of the President, the manner of that election, the extent of the executive power of the Union, extent of the executive power of the States, the Union judiciary, the High Courts, representation of States in Parliament, relation between the Union and the States, method of amendment of the Constitution, etc. require a special majority in Parliament plus ratification by not less than half of the total number of State legislatures. And for other provisions, only a special majority but no ratification by the States is necessary.

Therefore, the process of amendment laid down by the Constitution of India may be characterised in this way. The Constitution is to be regarded as rigid in so far as amendment requires a special majority and in some cases, also the ratification of the State legislatures. But this rigidity is qualified in many ways. First, there is no provision for a special body for amending the Constitution. Secondly, all bills for amending the Constitution must originate in either House of Parliament, the State legislatures being without any power of initiative in this regard. Thirdly, bills for constitutional amendment are to be passed in the same manner as ordinary legislation. Fourthly, no provision of the Constitution is unamendable and even

the method of amendment as laid down in Article 368 may be changed through appropriate legislation by Parliament. Fifthly, even the provisions dealing with fundamental rights can be changed easily by Parliament and naturally, a Constitution Amendment Act cannot be declared void on the ground of its incompatibility with the fundamental rights.

Thus, all these qualifications upon the natural rigidity of a federal constitution must be seen as introducing a very large degree of flexibility. Again, experience shows that the rigidity or flexibility of a constitution does not depend upon the prescribed procedure alone. To a much greater extent it depends upon the real wishes of the dominant group in society which may have real changes even though the letters remain unchanged. And in our case, the method of amendment has proved to be, instead of too rigid, as some feared, too flexible as shown by nearly a score of amendments since its inception on January 26, 1950. So long as a party has a solid majority in the Union Parliament, and in most of the States, the process becomes clearly not too difficult, but too easy. The temptation to take to constitutional amendment becomes particularly great when the ideals of a social welfare State are apt to be balked by the court insisting on due process and other legal safeguards. But while the device of judicial review as it obtains in the United States may or may not be fully consistent with a democracy in the populist sense, the fact remains that if constitutional amendment is frequently resorted to with the idea of getting clear of adverse judicial opinion,



then not only all idea about the supremacy and sanctity of the fundamental law of the country is destroyed but there may follow other serious consequences which we would do well not to ignore.

Thus, though the Constitution may be said to "strike a good balance" by placing "extra safeguards in the amending process so far as those parts of the Constitution are concerned which contain the division of powers between the States and the Union," and by requiring "the concurrence of the legislatures of at least half the States in their amendment, and though it is true that the constitution is really a means which should not be made much of, yet it can be said that the real criticism of the process of amendment laid down by the Constitution of India is not that it introduces a variety of amending processes making the constitution partly rigid and partly flexible but that the whole process makes amendment too easy in practice, under the existing circumstances. Constitutional government is a new and delicate experiment in the country and history shows that it is very largely a matter of popular habits and tradition. And popular habits imply some element of fixity, permanence, rigidity, etc without which habits cannot grow over a rather long period of time. Though our Constitution does not neglect the problem in theory, in practice it does, considering the actual state of things. It may be said that inculcation of the habits of constitutional government cannot be the task of a constitution which is rather their expression. True, but nevertheless the Constitution ought to have laid down far more definite guide lines in this regard as well as towards

the inevitable contemporary tendency towards a welfare State, which would have made unnecessary many of the amendments that have actually been made so far.

*Examine the claim of the Parliament of India to sovereignty. To what extent and under what conditions is it permissible for the Parliament of India to delegate its functions ?*

**Ans.** As regards the constitutional position of Indian Parliament, the primary question is whether it is a sovereign or a non-sovereign body. It is a non-sovereign body on account of the following considerations. In the first place, the Constitution is a written document and a written document almost inevitably means some limitations on governmental organs which are always under obligation to work within the framework provided by the Constitution, the fundamental law of the country. Secondly, the Constitution establishes a federal system which is characterised by a division of power between the Union and the units, the result being that all powers are not within the scope of the Union. Thirdly, as, in a federal system, the units are given a jurisdiction which is constitutionally made free from interference by the Union, except under certain stated circumstances, the existence of the sphere of the unit itself constitutes a limit to the competence of the union. And, fourthly, the Union itself has a legislative power which must always respect certain constitutional limits and the laws of the Union are generally subject to judicial review. In short, the Parliament in a federal system cannot in the nature of things be a sovereign body in the sense in

which the Parliament in Britain is sovereign, This is also the case in the U. S. A. where the congress has only a limited power of law making, being permitted by the Constitution to make law only on eighteen topics and its laws are really "of the nature of bye-laws valid whilst within the authority conferred upon it by the constitution but invalid or unconstitutional if they go beyond the limits of such authority."

Now, Prof. D. N. Banerjee is of the opinion that despite the arguments put above, it is not proper to describe unqualifiedly our Parliament as non-sovereign. He says it is partly sovereign and partly non-sovereign. And for regarding the Indian Parliament as partly sovereign, his main argument is put thus. "Our Parliament is virtually under what may be referred to as the first paragraph of Article 368 of the Constitution also a sovereign law-making body, like the British Parliament, for the purpose of effecting certain constitutional amendments, with only some slight procedural changes." Also, the limitation that is inherent in a written constitution is thought by him to be not of much value inasmuch as "classification of constitutions on the basis of whether they are written or unwritten is illusory."

But it may be pointed out that Prof. Banerjee's view is not tenable as is evident from the fact that in order to show the sovereign character of Indian Parliament, he has to introduce two qualifications in one sentence. In point of fact, what he does is to show that Indian Parliament is "virtually" sovereign and even that "with some slight procedural changes." But through these two loopholes, the whole case is given away because the

British Parliament is sovereign with no "virtually" about it and with no "some slight changes in procedure." In one word, to try to put the Indian Parliament on a par with the British Parliament so far as the question of sovereignty is concerned is stretching matters a bit too far involving violence to facts.

To conclude, the Constitution of India is the supreme law of the country. Though the Indian Parliament has been empowered to make certain amendments, yet that also is a power granted by and under the Constitution which must be obeyed by all government organs. And the character of a parliament under a federal system simply cannot be like what it is in Britain where the Constitution is both unwritten and unitary.

The term "delegated legislation" also, like many other legal and constitutional terms, comes from British constitutional law. In Britain, delegated legislation is legislation not by Act of Parliament but by Orders-in-Council, Orders Warrants, Regulations and Rules and has been a part of the parliamentary system for at least six hundred years. Parliament, however, made but sparing use of the power until the end of the nineteenth century when a changing idea of the part to be played by the State in the life of the community made inroads upon parliamentary time and made the system to be adopted on a more extensive scale. And during the twentieth century the ever increasing activity of the State has meant still more pressure on parliamentary time, a result of which has been the general acceptance of the system of delegated legislation with almost every Act of Parliament containing provision for its use.

In India during the British rule, the system was not unknown. But since the creation and adoption of the new Constitution meant an entirely new basis of constitutional life, whether the system of delegated legislation was permissible under the Constitution became a debatable point. An opportunity soon arose for having an authoritative opinion on the point. The President of India under Article 143 of the Indian Constitution referred the Delhi Laws Act 1912, the Ajmir-Merwara (Extension of Laws) Act 1947 and Part C States (Laws) Act 1950 to the Supreme Court for opinion. A full bench of seven judges of the Supreme Court considered the issue and decided by a majority opinion that the Indian Constitution did not permit the Legislatures to delegate their respective legislative functions.

Generally speaking, delegated legislation in the sense of the Legislature delegating its power to some other branch of the government, say, for example, the executive, may be prohibited on the basis of three broad principles. First, there is the principle of the separation of powers and this theory, as a fundamental feature of the U. S. Constitution has been seized upon by the judiciary there to prohibit the Congress from delegating its legislative power to any other organ. But obviously in a parliamentary system like the Indian one, the theory does not apply and thus was rejected by the Supreme Court of India. Secondly, there is the principle that a power which is itself delegated cannot be delegated again. This principle also while applicable in the U. S. A., was not considered so in the Indian context because in the opinion of the Supreme Court, the Legislatures

there were not delegates of any other authority but autonomous authorities. Thirdly, there is the principle of Constitutional Trust and Implied Prohibition and it was this principle that the Supreme Court applied in reaching its opinion. The Court analysed various Articles of the Constitution in the light of this principle and reached the conclusion that "though the Constitution did not expressly vest the legislative power in the Legislature, it had made elaborate provision as to how and by whom the legislative power was to be exercised, and the very fact that in some cases, for example, in emergency, it expressly provided for a delegation of the legislative power showed that the intention of the Constitution was that the legislative function must be exercised by the Legislature itself and that outside the express provisions contained in the Constitution itself there could be no delegation of the legislative power. The doctrine, however, was confined to the essential functions of the Legislature because delegation as to matters of detail was a necessity under modern conditions."

And, in the opinion of the Court, the essential functions of the Legislative include (i) "to declare what the laws shall be in relation to any particular territory or locality ; (ii) the power to extend the duration or operation of and Act beyond the period mentioned in the Article itself ; and (iii) the power to modify an Act without any limitation to the extent of modification."

Thus, in summary, we may say that Supreme Court was "reluctant to accept transfer of power to the Executive in the matter of essential legislation, which would have resulted in delegation in the strict sense."

The Court, however, "admitted the possibility of transfer of non-essential legislative power relating to conditional and subordinate legislation." There are two Articles in the Constitution, however, which allow delegated legislation in the strict sense of the word "According to Article 353 (b) Parliament in case of a proclamation of emergency made by the President is competent to confer powers on the Union and on officers and authorities of the Union. Similarly according to Article 357 in case of failure of the constitutional machinery in a local State, Parliament can delegate the power of the Legislature of the State to the President." Apart from the condition enumerated by these two Articles, delegation of essential legislative power is not permitted under the Indian Constitution as interpreted by the Supreme Court. This does not, however, preclude the executive authority from being vested with the power to make what is called subordinate legislation, a power which includes that of modifying existing or future laws, except for essential changes which basically mean a change in policy.

**Q.** *Discuss the correct constitutional position of the President of India.*

**Ans.** The Indian Constitution creates a parliamentary system of government on the British model with an elected President at the head. And the Constitution vests all the power of the Union government with the President. This creates a doubt about the correct constitutional position of the President. Broadly, there are two views on this point, one saying that "The President is the head of the nation but not of the executive. He

represents the nation but does not rule the nation ;” and the other view saying that “The President of India can, if he so chooses, become a real ruler and not a mere nominal executive head of the union.” Now, let us see.

Obviously the question of the real position of the President turns upon the question of whether the formidable powers vested in him by the Constitution are to be exercised on his own or on the advice of the ministry. The answer to the question may be put as follows.

There is no doubt that the Constitution establishes a parliamentary system of government of the British model. That model exhibits certain necessary features such as close connection between the executive and the legislature, political homogeneity of the ministry, collective responsibility of the ministry to the legislature, the nominal power of the king or the queen, predominance of the prime minister in the whole system etc. In short, the essence of the whole system lies in the distinction between the nominal head who has all powers in theory and the real head exercising real power subject to the regulation of the legislature. Now in Britain this system of what has been so aptly characterised as crowned republic is the product of many centuries of political evolution and the makers of the Indian Constitution, in copying this model, were evidently expressing a hope that here also gradually appropriate conventions would grow up, making the President occupy a position similar to that of the British sovereign.

The Constitution lays down that “there shall be a Council of Ministers with the Prime Minister at the head



to aid and advise the President in the exercise of his functions." But the Constitution nowhere lays down explicitly that the President is bound to act always according to the advice tendered by the ministers. Hence the contention that the powers of the President are to be exercised on the advice of the ministry is sought to be supported by two other provisions of the Constitution. The first relates to the provision making the ministry collectively responsible to the legislature or rather to the Lower House, and the second relates to the provision obliging the President to always keep and maintain a council of ministers. It is said that the meaning of these two provisions is to make the President a purely titular head, because, evidently no ministry is going to accept responsibility for actions over which it has no control. Also, in any case of the President choosing to act on his own disregarding the advice of the ministry, the ministry is certain to resign, obliging the President to try to find another ministry. But since the ministry is formed by the party having a majority in the Lower House, any other ministry is bound to be a minority ministry faced with the sure prospect of immediate defeat in that House. Thus the net result of the President disregarding the advice of the ministry of the majority party will be a constitutional crisis because of his inability to have a ministry which is constitutionally obligatory.

Without, however, denying the undoubted weight of this argument, it must at the same time be pointed out that this is by no means the whole of the matter, several equally important considerations being there to

be urged on the contrary. First, whereas in Britain any action of the Sovereign requires to be authenticated by the countersignature of minister responsible to Parliament, here the necessary rules in this regard have been left to be made by the President himself. Secondly, while the ministry is collectively responsible to the legislature, it is within the powers of the President to remove individual ministers from office. Thirdly, while in Britain the duty of distribution of functions between the ministers lies with the prime minister in India it rests with the President. Fourthly, the President must be informed of all that goes on in the meetings of the ministry. Fifthly, the President may require any information, in this respect, of the Prime Minister, who may even be asked by him to submit for consideration of the whole ministry any matter on which a decision has been taken without such a consideration. Sixthly, it is certainly rather unusual for a pure figurehead to have the power of withholding assent from a bill passed by the two Houses of Parliament. Seventhly, in any case of no party having a clear majority in Parliament, the President undoubtedly has considerable freedom in choosing the person to become the Prime Minister. And, finally, the advice to dissolve Parliament tendered by the Prime Minister, clearly may or may not be accepted by the President.

Thus all these make it clear that "the Constitution of India contains a vast reservoir of power for the President and in what manner these shall be exercised is the moot question on the answer to which shall largely depend the exact nature of the executive in India,

whether it will be purely parliamentary like the British King or he will effectively exercise some of his powers independently of his Council of Ministers. For even if he adopts the latter course, he will not be guilty of violating the Constitution." Under these circumstances it is certainly no exaggeration to charge the makers of the Constitution with a failure to sufficiently guard against the President becoming a dictator.

For making the President act as a purely constitutional ruler, there are his oath of office, the ultimate sanction of impeachment and the possibility of a constitutional deadlock following the resignation of the ministry due to differences of opinion with him. But apart from the last, the practical value of the other two is very much doubtful in view of the absence of any express provision requiring him to act always as a purely constitutional ruler, thus giving no clear basis on which the charge of impeachment might stand. In this connection, another very important point also deserves to be mentioned, namely, his power to send messages to Parliament, over and above his power of veto. It is impossible to argue that these powers have been given with the intention that they will not be used. The power to send messages to Parliament has been clearly taken from the Irish Constitution but the latter's provision that such a message must have received the approval of the government has been here omitted. This is a clear indication of an intention to enable the President to give public expression to his own views which may not be identical with those of the ministry in power.

Thus, as a matter of practice, at least as it has evolved up to now, the office of the President has remained a titular one. But the future must be said to be wide open, depending as it does clearly on too many imponderables of which perhaps the respective personalities of the President and the Prime Minister are most important. Thus even while accepting the truth of the view that to reduce everything to writing only makes for rigidity unhelpful to constant adjustment to a living and changing reality, it cannot also be denied that such an important issue might properly have been put beyond any doubt by an express provision in the Constitution. This contention also gathers added strength from the undoubted fact that constitutional government in this country has to work under many handicaps which will continue to exist for a long time to come.

**7. Q.** *Discuss the provisions of the Constitution of India regarding the rights Constitutional Remedies and the limitations thereto.*

**Ans.** A right has been defined as a condition without which a person cannot develop his best self. Accordingly a fundamental right may well be regarded as one which is vitally necessary for the attainment by the individual of his full moral and spiritual stature. And it is a common modern practice to include in the Constitution a list of some fundamental rights. The purpose is "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to

establish them as legal principles to be applied by the Courts.

But though the inclusion of the fundamental rights in the Constitution makes for their greater security, yet the need is felt for an express provision for Constitutional Remedy in case of any interference coming from any quarter. Thus it is that the Indian Constitution not only enumerates various fundamental rights under the heads of right to freedom, right to equality, right against exploitation, right to freedom of religion, cultural and educational rights, right to property, but also expressly provides for the right to Constitutional Remedy.

In a sense this right to Constitutional Remedy is the most important right inasmuch as in its absence all other rights are no more than formal with very little real value. This provides the right to move the Supreme Court for the enforcement of fundamental rights. This right is given by Art. 32 of the Constitution. This article has four sections. The first section declares that "the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed." The second section clearly establishes the right of the Supreme Court to issue writs such as *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* for the enforcement of any of the rights. The third section enables Parliament to confer the authority to issue writs on any other without prejudice to the power of the Supreme Court in this respect. And the last section enumerates the conditions under which this right can be suspended.

The importance of the first three sections of this

article can be seen from the remark of the Supreme Court that "Article 32 provides a guaranteed remedy for the enforcement of the rights conferred by Part III and this remedial right is itself made a fundamental right by being included in Part III. The court is thus constituted the protector and guarantor of fundamental rights and it cannot consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against such infringements of such rights." The court as the guardian of the fundamental rights has both original and appellate jurisdiction. And it is important to notice that the individual has a remedy in a High Court does not prejudice his right to go directly to the Supreme Court. But application to the court will be entertained as falling under Article 32 only when the threatened right is a part of the rights enumerated in Part III of the Constitution.

The fourth section of Article 34 enumerates the conditions under which the right to Constitutional Remedy may be suspended. The conditions relate to what are called emergency situations proclaimed by the President. The President has been authorised by the Constitution to declare three types of emergency. First, if the President is satisfied that the security of India or any part thereof is threatened by war, external aggression, or large scale internal disturbance, he may issue a proclamation of emergency. Such an emergency may be declared by the President on his being satisfied about the imminence of such dangers. Secondly, if the President, on receipt of a report from the Governor of State, is satisfied about the breakdown of the

constitutional machinery there, he may by Proclamation assume all or any of the powers of the State government, other than those of the Legislature and the High Court, and declare that the powers of the State Legislature shall be exercised by and under the authority of Parliament. Thirdly, if the President is satisfied that a situation has developed where by the financial stability or credit of India or any part thereof is threatened, he may issue a Proclamation of Emergency on that account. There are various legal and constitutional consequences of these Proclamations of Emergency, of which the most important is the suspension of the fundamental rights including the right to Constitutional Remedy.

In this connection it should also be noted that the Constitution also allows for Indemnity Acts which protect the activity of any official during the prevalence of martial law in an area. But there is the issue as to whether such Indemnity Acts apply to cases of emergency situations other than martial law. For example, there is the opinion of the Supreme Court that—“If at the expiration of the Presidential Order, Parliament passes any legislation to protect executive action taken during the pendency of the Presidential Order and afford indemnity to the executive in that behalf, the validity and the effect of such legislative action may have to be carefully scrutinised.”

The provision for the suspension of fundamental rights including the right to Constitutional Remedy during an emergency does not mean that it will follow automatically. The enforcement of fundamental rights may be maintained and finally there is the need for submitting

the proclamation of emergency to the approval of Parliament. But nevertheless the fact remains that during an emergency the executive has the power to suspend fundamental rights including the right to Constitutional Remedy and in the context of party government, the check supposed to be exercised by Parliament is no more than formal. Thus there seems to be much truth in the criticism of H. V. Kamath made in the Constituent Assembly when the article was being debated upon—"I fear that by this single chapter we are seeking to lay the foundation of a Totalitarian State, a Police State, a State completely opposed to all the ideals and principles that we have held aloft during the last few decades, a State where the rights and liberties of millions of innocent men and women will be in complete jeopardy, . . . Such an impression again tends to be strengthened by a look at the relevant provisions in the U. S. A., for example. In the United States, none of the fundamental rights guaranteed by the Constitution can be suspended, except the right to *habeas corpus*, and even that can be done only by the Congress in case only of external invasion or internal rebellion. But the position in India is definitely much more precarious from the point of view of the citizens.

**Q.** *"The problem of democracy is how to balance discipline with freedom, the good of the whole with the good of the parts."* Discuss the right to freedom in India under this light.

**Ans.** The conception of right is a social conception and truly without a society conscious of common moral ends there cannot be rights. This may be taken to



mean that while some kind of an ordered social life is essential for the existence and maintenance of what are called rights, this social life also tends to degenerate into a merely habitual rut without a zealous regard for these rights which have been defined as the conditions without which no man can develop his best self, the sole end and justification of all social and political arrangements. That is for a civilised and progressive social life, both freedom and discipline are equally necessary and the question of their right balance becomes of supreme importance. Thus every democratic State guarantees certain rights to its citizens but at the same time these rights are put under certain limitations with a view to securing the basic interests of the social order as against those of the citizens considered individually. And in India also we find the same question of a balance between freedom and discipline faced the constitution-makers and let us see how they set about finding a proper answer.

The right to freedom, as guaranteed under the Indian Constitution, includes the right to freedom of speech and expression, to assemble peaceably and without arms, to form associations or unions, to move freely throughout the territory of India, to reside and settle in any part of the territory of India, to acquire, hold and dispose of property, to practise any profession, or to carry on any occupation, trade or business.

It goes without saying that no right can be absolute and naturally the right to freedom also is subject to certain limitations which the Constitution empowers the State to impose through its laws in the larger interests of

the community. Thus freedom of speech and expression is limited by the laws of defamation, libel, contempt of court, decency, morality, security of the State, consideration of friendly relation with other States, public order, etc. Freedom of assembly is subject to the provision that it shall be peaceable and without arms, and must be exercised in such a way as not to involve any breach of peace. Similarly the freedom to form association or union does not mean the freedom of any group to enter into any criminal conspiracy or to form a union likely to become a threat to peace and order. The right to free movement may be placed under two limitations in the name of the interest of the general public, and protecting the interests of any Scheduled Tribe. The Tribal People again for the sake of their own protection have been placed under several limitations regarding alienating their own properties. The same idea may prompt the creation of restrictions regarding the rights of citizens freely to go and settle in their midst. The right to the freedom of profession, occupation, trade or business is limited by the power of the State (i) to prescribe the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business ; and (ii) to carry on itself directly or through a corporation owned or controlled by it, any trade, business, industry or service.

Under the heading of the right to freedom also comes the provision for protection against *ex post facto* law, against double jeopardy, against being compelled to turn a witness against oneself, etc. Finally comes the provision for the protection of personal liberty, which

lays down that no person can be deprived of his liberty except according to procedure established by law.

Now, declaration of rights is one thing and their protection in actual life is quite another. And needless to say that the rights guaranteed by the Constitution lose much of their value unless the Constitution at the same time provides for their protection. As to the best way of providing protection to such rights, broadly there are two opinions. One opinion says "Rights cannot be declared in a constitution except in absolute and unqualified terms, unless, indeed, they are so qualified as to be meaningless. It is in the ordinary law itself that the careful definition of rights can be best undertaken, with the added guarantee that the law, since it has been passed by a legislature, may in most cases be in line with dominant public opinion." And the other opinion pins its faith on what is known as the "due process of law." What due process of law precisely means has never been clearly defined. "Broadly equivalent to law of the land as guaranteed in Magna Carta and to the rule of law upon which English jurists traditionally have placed great stress, it has, like those phrases, been subject to steadily broadening and deepening interpretation."—"Sometimes it is invoked in defence of rights of a procedural character, that is, as a restriction upon the manner in which one may be deprived of life, liberty, or property and at other times, in behalf of rights that are by nature substantive, that is, as a restriction upon what may be done with similar rights. In the one form, it operates as a restraint principally upon the executive and the judicial branches

of government; in the other, principally upon the legislative branch." It is clear that the above mentioned two methods of protecting rights are followed respectively in the U. K. and the U. S. A. It should also be mentioned that England, without a due process clause which applies to matters of substance, does through equity jurisdiction just about the same thing as the Supreme court of the United States does under due process of law as a matter of substance. In other words, under the first arrangement, for protection of rights we look to the legislature and under the second arrangement, to the judiciary. And from this point of view it becomes clear that the Indian Constitution by replacing the "due process" clause by "procedure established by law" favours the first method.

Though there is no inherent reason why we should regard the judiciary as a better protector of rights than the legislature, yet there are important practical considerations for favouring the judiciary. First of all, what is the meaning of "procedure established by law"? It means procedure prescribed by the law of the State and "it cannot be disputed that a competent legislature is entitled to alter the procedure in criminal trials in such way as it considers proper." From this it follows that when our Constitution says that no man will be deprived of his liberty except according to procedure established by law, it imposes restraint on the executive but not the legislature. Even in a sense the restraint imposed upon the executive loses its value inasmuch as in the context of a parliamentary system the executive is almost always backed up by a solid majority which enables it to have

any law passed. Secondly, even if it is said that ultimately rights in practice are bound to be what the dominant public opinion makes them, it may be urged that it is precisely to prevent that from happening that certain rights are inserted into the Constitution. "The purpose behind declaring certain rights as integral part of the Constitution is precisely to withdraw certain subjects from the vicissitudes of political controversy... they depend on the outcome of no elections." Thirdly, in Britain the rights of the people are entirely a matter of ordinary law and hence in the hands of the legislature. But Britain has no written constitution either. Thus our decision to have a written constitution, to have certain constitutionally sanctioned rights declared as fundamental unlike as in Britain and at the same time to allow the legislature, like in Britain, to tamper with those rights do not really go together. And the whole arrangement becomes curious, to say the least, when we remember the utter absence in our country of the long tradition that in Britain is the real guarantee that the legislature, even though formally competent, will not in reality try to interfere with the rights of the people.

Thus it may be said that so far as the solemnly proclaimed rights under the Indian Constitution are concerned, their actual maintenance depends largely on the goodwill and self-restraint exercised by the legislature.

This, again, becomes almost self-evident from the fact that the Constitution itself authorises the enactment of Preventive Detention Acts both at the Union and at the State levels to arrest and detain persons without trial

for alleged reasons relating to the security of the State, maintenance of public order, maintenance of essential supplies and services, etc. "Detention in such form is unknown in America. It was resorted to in England only during war time but no country in the world...has made this an integral part of their Constitution as has been done in India."

To conclude, the fact, namely, the powerlessness of the judiciary to pronounce on the justness or otherwise of a law taking away personal freedom whether through a particular procedure laid down by the legislature or through Preventive Detention Act, clearly justify the saying that the right to freedom under the Indian Constitution is really truncated and moth-eaten and that "in the issue of public interest versus personal liberty the cause of the latter had suffered a set back..."

9. *Q. Discuss the emergency powers of the President of India. How far do they affect the federal character of the Constitution?*

*Ans.* The Constitution of India says that there shall be a President of India to be elected by an electoral college consisting of the elected members of both Houses of the Union Legislature and the elected members of all State Legislatures, by a system of proportional representation by a single transferable vote by means of secret ballot.

Just as the British monarch is in theory the holders of absolute powers of government but the real wielders of power are the popularly elected ministers remaining responsible to Parliament composed of the elected representatives of the people, the intention of the Indian

Constitution is to make the office of the President similar in character. So the Constitution gives him a very large amount of power which, it is intended, will in reality be exercised by popularly elected ministers headed by the prime minister. Of the formidable list of powers vested in the President under the Constitution, those that go under the name of emergency powers, really deserve very careful analysis for their possible consequences specially on the character of the Constitution. These powers may be described as follows.

The Constitution empowers the President to declare three kinds of emergency. First, if the President is satisfied that the security of India or any part thereof is threatened by war, external aggression or large scale internal disturbance, he may issue a proclamation of emergency. Such an emergency can be declared by the President on his being satisfied that such dangers are imminent. Such a proclamation may be revoked by a subsequent proclamation and the original proclamation must be laid before Parliament and unless Parliament approves it, will cease to be valid after two months.

If when the proclamation is made, the House of the People is dissolved or is dissolved within the stipulated two months or in any way the proclamation is not approved by it, will expire after thirty days from the sitting of the House of the People unless extended by the same in the mean while.

The net effect of such a proclamation is to transform the Constitution into a unitary one with the consequences that Parliament will have unrestricted power to make laws for the whole of India or any part thereof, the

executive power of the Union will be extended to the giving of directions to the States in any matter regarding how power is to be exercised, fundamental rights including that of Constitutional Remedy will go in abeyance, etc.

Secondly, if the President, on receipt of a report from the Governor of a State, is satisfied that in that State there has occurred a breakdown in the constitutional machinery, he may, by proclamation of emergency, assume all or any of the powers of the State Government other than those of the Legislature and the High Court, and declare that the powers of the State Legislature shall be exercised by and under the authority of Parliament. This kind of proclamation also has a validity of two months, unless in the meanwhile extended by Parliament. But in no case can it be extended for more than three years.

Here the important point to be noted is that for issuing the proclamation for this kind of emergency, the President need not wait for the report from the Governor but may do so on his own initiative. Article 365 also provides that any failure of the State, whether through inability or through unwillingness, to comply with any direction of the Union given lawfully may also be construed as breakdown.

Thirdly, if the President is satisfied that a situation has developed whereby the financial stability or credit of India or any part thereof is threatened, he may issue a proclamation of emergency on that account. When such a proclamation is under operation, the executive authority of the Union will extend to the giving of



direction to the States regarding financial policy. These directions may include provisions requiring the reduction of salaries and allowances of all classes of State employees and during this period all money bills and other financial measures must be kept reserved for the consideration by the President even after they have been approved by the State legislature. During such an emergency covering the whole of India, the President has also the authority to reduce the salaries and allowance of all kinds of union employees including the judges of the Supreme Court and of the High Courts.

Now, there is no doubt that these emergency powers in the hands of the President, really makes the union immensely stronger than the States and have as such been widely criticised as seriously detracting from the federal character of the Constitution. While there is no doubt that a proclamation of emergency gives clear opportunity for transformation of the character of the Constitution from federal to unitary, the question is whether on that account the federal claim of the Constitution is to be discounted. A discussion of that point may be put as follows.

In the words of Dr. Ambedkar, "...these overriding powers are not the normal feature of the Constitution. Their use and operation are expressly confined to emergencies only. The second consideration is : could we avoid giving overriding power to the Centre when an emergency has arisen ? Those who do not admit the justification for such overriding powers to the Centre even in an emergency, do not seem to have a clear idea of the problem which lies at the root of the matter." The sole

justification of this great array of powers lies in that during an emergency the people should "take into consideration alongside their own local interests, the opinion and interests of the nation as a whole." And indeed, is it not a fact that in all federations, during an emergency, such as a war, the Union inevitably will have to be the dominant power in practice at least, if not in theory. Of course, the nature and extent of the power that the Union is to assume or permitted to assume may differ from country to country but surely that depends primarily on the degree of development of the sense of national unity and identity which enables the nation to meet and overcome even serious threats with relative ease. And no one can say that in our country that required national sense has reached the point where the national interest will get the better of any parochial interests even without any overt overriding power at the disposal of the Union. Again, it is increasingly coming to be recognised by scholars that federalism is not a matter of certain fixed and rigid institutional arrangements, it is more a matter of spirit than of form, of practice than of theory. And the determining role goes not to the formal theoretical considerations but to the exigencies of the actual situation and the spirit of the people. From this point of view, though the provision of emergency powers of the President may be criticised as undermining the federal character of the Constitution, yet from a realistic and practical point of view, keeping our view on the actual practice since the inauguration of the Constitution, it may be said that so far at least the federal spirit has been kept alive. And

as to whether it will always remain so, the answer clearly depends partly on the ability of the people to tackle important national problems within the federal framework and partly upon circumstances beyond our control, external forces working upon our political life necessitating its modification and adjustment to meet any possible challenge from that direction.

**Q.Q.** *Compare and contrast the role of the Supreme Court in India with that of the U. S. A.*

**Ans.** The federal system of India, instead of following the usual pattern of distributing judicial power into Union and State levels, has established a single unified judiciary. At the head of the judicial system stands the Supreme Court. Below it are the High Courts of the different States and below them other lower courts. The Supreme Court of India is court of record and has four types of jurisdiction, exclusive original, appellate, advisory, and the jurisdiction to issue directions, orders and writs.

The Supreme Court of India is at the same time a federal court, the highest court of appeal in the country, and the ultimate interpreter and guardian of the Constitution. This explains its wide range of powers. Its exact position, however, can best be seen through a contrast with its American counterpart with which it has certain similarities as well as dissimilarities. Such a contrast may be described as follows.

First, the appellate jurisdiction of the Indian Supreme Court may be said to be wider than that of its American counterpart inasmuch as the latter is

confined to cases arising out of the federal relationships or out of any dispute about the constitutional validity of the laws and treaties while the former as the highest court of appeal in the land enjoys an appellate jurisdiction covering civil and criminal cases as well as those relating to the interpretation of the Constitution.

Secondly, the appellate jurisdiction of the Indian Supreme Court is also wider by virtue of its ability "to entertain appeal, without any limitation on its discretion, from the decision not only of any Court, but also of any tribunal within the territory of India," no such power being enjoyed by the United States Supreme Court.

Thirdly, the United States Supreme Court has no advisory role and power which has been granted to the Indian Supreme Court expressly by the Constitution.

Again, we know that one of the basic requirements of a federal system is the existence of a federal court charged with the business of interpreting and protecting the Constitution, settling any dispute between the Union and the States or between the States themselves regarding their respective constitutional competence and limit, and seeing that both the Union and the States keep scrupulously within their respective spheres as determined by the Constitution. These functions are normal for a Supreme Court in a federation and are common to both the United States and the Indian Courts. Again, it is said that such a Court in a federal system by virtue of its position must naturally have a power of judicial review in the sense that it can declare laws unconstitutional and as such void if it thinks such laws to be

inconsistent with the Constitution. Though this necessity of the power of judicial review is not by any means accepted by all, the fact remains that the Supreme Court of the United States provides the prime example of power of invalidating laws of both the Union and the States on the ground of unconstitutionality and the Indian Court also has such a power though not to the same almost unlimited extent.

Though in respect of the powers and jurisdiction discussed so far, the Supreme Court of India may be said to occupy a position broadly similar to the Supreme Court of the U. S. A., yet there are certain other points in respects of which the Indian Supreme Court is seen to be in a definitely less powerful position.

First, the Supreme Court of the U. S. A. can by virtue of its original jurisdiction try cases in which foreign ambassadors, consuls, etc. are involved. The High Court of Australia also enjoys a similar power but the Indian Supreme Court has no such power.

Secondly, the Constitution lays down certain matters in which the laws passed by the legislature will not be open to judicial review. Some of the more important of these are : (a) The Courts cannot challenge any law prescribing procedures for arrest and detention of individuals and even for taking their lives. Only if any particular clause of such a law goes directly against the Constitution, can the Courts declare it void on that ground. (b) As regards taking over permanently or temporarily by State of private property, the Constitution accepts the principle of compensation but leaves the amount and manner of payment of compensation

entirely in the hands of the legislature, the Courts being unable to challenge any law prescribing these.  
(c) Some electoral matters have been deliberately kept beyond the jurisdiction of the Courts which cannot question any law relating to delimitation of Constituencies or allotment of seats to Constituencies.

To conclude, "in India the position of the judiciary is somewhere between the Courts in England and the United States." In England the Parliament is sovereign and the Courts cannot declare invalid any law of Parliament. On the other hand, in the U. S. A., the Supreme Court has the power to examine the consistency of any law with the Constitution as well as the intrinsic justness or otherwise of the law itself. The Supreme Court in India stands in a position midway between the two. It can declare laws invalid on their being against the Constitution but it cannot do so in all cases and neither can it go into the question of intrinsic nature of the law itself. In other words, "our Constitution, unlike the American Constitution, does not recognise the absolute supremacy of the Court over the legislative authority in all respects, for outside the restricted field of constitutional limitations our Parliament and the State Legislatures are supreme in their respective fields and in that wider field there is no scope for the Court in India to play the role of the Supreme Courts of the U. S. A."

*Q. Discuss the position and powers of the Canadian Senate as federal second chamber.*

*Ans.* The Senate in Canada is the second chamber of the federal legislature. It consists of 102 members

nominated by the Crown, through the Governor-General, on the advice of the government of the day. The members of the Senate are supposed to represent the four great geographical sections of the country, the Maritimes, Ontario, Quebec and the Western Provinces, each being assigned twenty-four senators. "Their representation is broken down still further. Each of the four Western Provinces is assigned six senators, New Brunswick and Nova Scotia each have ten, and Prince Edward Island has four. When Newfoundland came into the Dominion in 1949, it was allotted six senators, raising the total number from 96 to the present 102." The members of the Senate are appointed for life.

The Canadian Senate has equal legislative power with the lower chamber, the House of Commons. Whether its power in financial and money measures is inferior to that of the lower house is a matter of some debate among constitutional authorities. However that may be, in practice, the Senate is now restricted to very narrow functions. Broadly, its chief functions may be described as suspending and revising, though even these do not go unchallenged. And another function performed by the Senate in Canada, as indeed it is done in Britain by the House of Lords also, "consists in helping to lubricate the party system...it often helps party leaders in forming or reforming a government and in executing other party manoeuvres to be able to kick some one upstairs."

Thus the Canadian Senate shows several characteristics of its own. First, it is clearly modelled on the

British House of Lords with, however, the plan of nomination for life in place of the hereditary principle. Secondly, it is like its counterpart in the U. S. A. is a deliberate construction with aim and purpose. Here, as in the U. S. A. "a number of States or provinces of greatly unequal size and population were being federated under a national government. Representation in the lower federal chamber was to be on the basis of population, and it was thought that giving the States or provinces equal, or something approaching equal, representation in the upper chamber would safeguard the interests of the less populous in the general councils of the nation." Thirdly, appointment by nomination has made membership of the Canadian Senate wholly a gift of the party in power limited only by the number of vacancies and the requirement that those chosen must be residents of the areas for which vacancies have occurred. Fourthly, as in the U. S. A., the Senate in Canada was also designed as a check on the popular chamber. "It was widely feared that the people and the representatives they chose for the lower chamber would be easily swayed by gusts of emotion and even moved by the baser passions of envy and cupidity. It was thought to be important for stability, for the security of minorities, propertied and otherwise, that an upper chamber representing more conservative elements and not chosen by popular vote should check the vagaries and the envious appetite of the lower chamber." This explains the appointment for life as the method of recruitment. Fifthly, the Senate in Canada has failed to be a truly federal second chamber safeguarding the



interests of the units and it has also failed to be an effective check on the first chamber, even though accorded equal power. The first failure is explained by Strong by saying "The Senate in Canada attempts the impossible ..it wished to do what it could not do consistently with the system of choice by the central power, namely, to maintain the federal idea. This can only be done on the basis of equality among the States forming the federation, each choosing its own senators. All that the constitution achieves is that the three original Provinces shall not have their membership of twenty-four each increased or decreased ..These crosspurposes have their effect on the prestige of the Senate in Canada, which has neither the power attaching to an elective Second Chamber nor the usefulness of an Upper House which enshrines the federal idea."

And the effectiveness as a check on the popular chamber has also clouded it because for one thing the lower chamber has not been "nearly so passion-ridden as was feared," and for another, "the membership of the Senate has been predominantly of a conservative cast, in a social rather than a political sense, according an exaggerated representation to business interests but the political influence of the Senate has steadily declined almost to the vanishing point. Lacking entirely a popular basis in the electorate, it rarely has enough confidence in its convictions to stand firmly against what it regards as radical innovation. More important, the cabinet is responsible to the House of Commons and must bend all its energies to placating

and holding the confidence of the lower chamber where the banns are read and all the solemn vows are taken."

Thus behind the creation of the Canadian Senate worked the same kind of purpose as behind the creation of the American Senate. But in course of time the Senate in the United States has become at least as much representative of economic and social interests of a nation-wide extent as of particular geographic sections. Also, at least since 1913 when direct election was introduced, the Senate in the United States "has come increasingly to be moved by the impulses at work within the electorate as a whole." These combined with some other factors inherent in the arrangement established by the Constitution have "made the Senate the dominant partner in legislation in the U. S. A. When the two members disagree on a bill and a compromise has to be arranged through a conference committee, the Senate generally makes the fewest concessions." Thus the widespread doubts about the second chamber, its value and utility, do not apply to the United States Senate and judged by standard, the Canadian Senate, like the British House of Lords, pales into significance in all respects, power, prestige, influence as well as functions.

**12. Q.** *Discuss the distribution of power between the Dominion and Provincial Governments in Canada and compare it with that of the U. S. A.*

**Ans.** Canada is a federal State. Federalism is of prime importance in Canadian politics. The guarantee of considerable autonomy was not only imperative as a

condition of union but has remained an essential feature of the system because of the diversities of regional economics, the racial composition of the population and the differences of political experiences of the different parts of the people. The essential mark of a federal system lies in a distribution of the powers of government between the Union and the Units and that is found in Canada also. The scheme of distribution of power followed in Canada may be described as follows. •

The British North America Act of 1867 makes two lists of both Dominion and Provincial powers. The powers of the Dominion are described in the Section 91 of this Act. This Section opens with vesting in the Parliament a comprehensive power to legislate for the peace, order and good government of the country. After that it specifies the powers of the Dominion Parliament over 28 subjects of exclusive jurisdiction. The list includes practically all those possessed by the United States Congress and several other more such as criminal law, penitentiaries, marriage and divorce, probate, currency and banking, interest and bills of exchange, etc. The list is only illustrative and by no means a definitive statement of the scope of Dominion power. Also, many of the topics are stated in wider terms than in the U. S. Constitution. Trade and commerce, for example, are not restricted to inter provincial aspects; taxation extends to any mode or system. Though some expected powers are absent, such as those relating to war, extra territoriality, and treaties, this omission is to be explained on the ground that they were not within the scope of a colonial legislature in 1867 or technically

are branches of the royal prerogatives. In any case they now fall within federal jurisdiction.

Section 92 of the Act of 1867 gives power to the Provinces on 16 matters. These include the amendment of provincial constitutions, the establishment of local government, and provincial Courts, direct taxation, roads, hospitals and public works, the incorporation of companies with provincial objects, property and civil rights within the province, and all matters of a merely local and provincial nature in the province.

Section 95 describes concurrent power of both the Dominion and the Provinces over agriculture and immigration. Naturally, it is also provided that in the concurrent sphere, in any case of conflict between a law of the Dominion Parliament and a law of any of the Provinces the former will stand and the latter will be void to the extent of its repugnancy with the Dominion law.

From this description of the distribution of power between the Dominion and the Provinces, it is clear that the Dominion was made immensely stronger than the Provinces. And this intention to secure a strong national is explained thus. "When the terms of union of the British colonies in North America were under discussion in the eighteen-sixties, seventy-five years of experience under the federal constitution of the United States were available for guidance. This experience had just culminated in a civil war that threatened to destroy the union. The immediate, if not the underlying, cause of the civil war had been the claim by the southern States of the right to withdraw from the union...The

framers of the Canadian federation wanted to make it clear from the beginning that such a claim had no semblance of right in the Canadian federation." Thus though there are provincial rights, they are not tinged with sovereignty, and even as a compact the new Union was provided with preponderent authority. There are no provincial militias, nor are provinces equally represented in the Senate. The Central government possesses a veto over provincial legislation though it is now rarely exercised, the representative of the crown in each province, the Lt. Governor is a federal appointee as also are provincial judges above county court rank. Moreover, in the distribution of legislative power, the Dominion Parliament has been a dominating position bolstered up by the residual power also being vested in it, thereby enabling it to make law for the peace, order and good government of Canada except as restricted by specific grants to the provinces.

In Canada, as in other federations also, the relation of Dominion and provincial powers has been the most important as well as the most recurrent constitutional problem. In modern times, the problem finds its expression most clearly in the fields of finance and social service. The provincial jurisdiction has been interpreted to embrace such expensive fields of governmental action as public health, education, and unemployment relief, yet provincial revenues have continued to be limited to direct taxes. The central government on the other hand has had an enormously expansible revenue but in peace time at least a restricted area of activity. Such an anomaly has been brought about by the trend of judicial

interpretation in Canada, which unlike in the U. S. A., has from the beginning tended to curb the Dominion jurisdiction and expand the provincial jurisdiction in many respects.

Now, coming to a comparison of the Canadian scheme of distribution of power with that of the U. S. A., the difference is marked. While the framers of the United States' Constitution worked with the express purpose of instituting a limited national government leaving as many of the powers of the States as possible with them, the framers of the Canadian Constitution had exactly the opposite end in view. Indeed, the central government in Canada has been put in a position that prompts Prof. Wheare to describe it as at most quasi-federal. But in social and economic matters, what men plan and what ensues are often quite different things. But these Constitutions have been interpreted by the Courts on almost innumerable occasions since their adoption and the results vary surprisingly. In one case, a weak government has been transformed into a very strong one and in the other a government endowed with very large express powers has been often put under leash and both through the instrumentality of judicial interpretation. Thus as Prof. Wheare says, "It might be said therefore that the Australian Constitution works in practice like a unitary Constitution embodying a considerable measure of decentralisation or devolution, although in law it remains federal. In Canada on the other hand the Constitution, though in law quasi-federal, is in practice nearer to federalism than the Australian."

**Q.** *Discuss the system of federal-State co-operation in Canada.*

**Ans.** "There are two main areas in which there is room for intergovernmental co-operation in a federation. There is the area of relations between the general and regional governments, where, through the effects of the division of powers, co-operation is needed to ensure that co-ordinated and complete administration of the divided fields is attained. Then there is the area of inter-regional relations, the relations of State and State, or province and province." Naturally in all the federations, attempts have been made to attain co-operation in both these spheres. The system of co-operation between the Dominion and the provinces developed in Canada may be described as follows.

In Canada, the chief agency in the field of Dominion-province co-operation is the Dominion-Provincial Conference. This conference first took place in 1906 and up to 1950 "there have been twelve such conferences, and nine of these have been held since 1926. They have discussed constitutional reform, financial relations between the Dominion and Provinces, the Statute of Westminster, road and rail transport, unemployment relief, company law, agriculture and marketing, the social services and the development of tourist traffic." It cannot be said, however, that these conferences have always produced agreement. The conference of 1931, for example, agreed about "the provisions which should be inserted on Canada's behalf in the Statute of Westminster."

But these conferences are by no means either regular

or as fruitful as they might be. For their failure to be as fruitful as they might be, the reason is that "the governments had not taken pains to accumulate and analyse data in preparation for the work of the conferences. Delegates who come to conferences inadequately briefed on the matters to be settled hesitate to agree on anything because they are not in a position to estimate the consequences of any agreement they might make." In view of this great practical difficulty the Rowell-Sirois Commission in its report of 1939 recommended that Dominion-Provincial Conferences at regular intervals and with a permanent secretariat should form part of the machinery of Canadian government. But such a recommendation has yet to be acted upon.

Meanwhile, we may refer to the agreements reached in the conferences of 1940 and 1950. In 1940 the Dominion and the Provinces were able to agree that unemployment insurance should be transferred to the control of the Dominion and this was carried out later in the year by legislation at Westminster. But in the conference called in 1941 there was great deal of disagreement and the representatives left with most major questions unsolved and even undiscussed. The conferences of 1945-46 on financial relations adjourned sine die without agreement."

But apart from these conferences, there is another and more effective method of Dominion-Province co-operation, namely, "the use by the general government of its powers to make grants in aid and to require of the regions which accept the grants that certain uniform standards be imposed in legislation." In



Canada, the relationship between the Dominion and the Provinces in the fields of finance and social services has always been a problem. The provincial jurisdiction has been interpreted to embrace such expensive fields of governmental action as health, education and unemployment relief; yet provincial revenues have continued to be limited to direct taxes. The central government on the other hand has had an enormously expansible revenue but in peace time, at least a restricted area of activity. The difficulty involved in such an arrangement was brought home to all concerned during the depression years. The Sirois Commission, appointed in 1937 to study these problems, made the proposals "First, that certain onerous provincial responsibilities such as relieving unemployment should be placed solely on the Dominion. Second, in return for relief from these burdens, the provinces should surrender entirely to the federal government three vitally important sources of taxation, personal income-tax, corporation tax and succession duties. Third, those provincial governments which still had a gap between income and outgo after these adjustments should be given by the Dominion an annual unconditional grant large enough to close the gap but subject to certain safeguards designed to prevent abuse." But the general reception to these proposals was very much hostile and the conferences called for discussing them ended without any discussion.

After the second world war, "The Dominion Government tried to get each province to agree separately to surrender the three tax sources in question in return for

large compensating annual federal grants. By 1947, all provinces except Ontario and Quebec had entered into such agreements for a five-year period. On the expiry of these agreements in 1952, they were renewed on terms much more favourable to the provinces and accepted by all provinces except Quebec." This pattern continues even now but one thing is fairly certain that in the field of Dominion-Provincial relation as regards finance, Canada has not yet been able to evolve any formula agreed upon by all the provinces, though perhaps the trend of central domination is now too strong to reverse in fact, if not in theory.

In other words, despite the unwillingness of the provinces to submit to what we may call the imperatives of contemporary conditions, the need for federal-State co-operation in legislation, in administration and in finance can hardly be denied. In Canada, this co-operation is secured through the Dominion-Provincial Conferences and through the federal grants-in-aid. But even besides these, a few other means may be mentioned which work towards the same end, "Federal statutes sometimes adopt the relevant provisions of the State law as the federal law to be applied in that State. State laws often adopt the relevant provisions and administrative regulations in the same way, as when provincial legislatures and executives in Canada adopt Dominion statutory provisions and administrative regulations relating to the marketing of agricultural products.

Sometimes attempts are made to fuse the administration of federal and State laws on a particular matter by making State officials federal agents for administering

the federal part of the activity and vice versa." We may also mention the fact that the Dominion government has established a Council of scientific and industrial research whose result are made available to State governments.

Nevertheless, it may be said that "methods and organs of consultation and co-operation, between the Dominion and the provinces, developed in Canada are still in rudimentary forms, going little beyond informal consultation between governments and government officials and occasional Dominion-Provincial Conferences on critical issues.....While Dominion-Provincial Conferences do not always reach agreement, they have become very effective instruments for patient, detailed exploration and understanding of differences." Again an important reason for the relative underdevelopment of methods and organs of federal-State co-operation lies in the natural difficulty involved in a drastic modification of the established relationship in a federation. But while this difficulty may resist the growth of informal methods of co-operation to bring about the necessary modification, in certain cases the force of circumstances may be so great that a constitutional amendment may have to be passed to accommodate the change. An example is provided by the fact that "Because the Canadian provinces could not get together for concerted action in establishing provincial unemployment insurance schemes, they finally accepted an amendment to the British North America Act transferring full constitutional authority over this subject to the Dominion. In short, what is called co-operative federalism has to come to say and will join in scope and significance more and more.

**14. Q.** *Write a critical note on the character and content of the Canadian Constitution.*

**Ans.** The constitutional system of Canada presents three distinctive features—a monarchical form of government, a federal structure and a parliamentary type of responsible cabinet administration. Besides, there are certain imponderables also, a general conservatism combined with a democratic faith, an ardent political nationalism that acknowledges the necessity of preserving a bicultural society and a recurrent insistence on complete autonomy for the provinces while maintaining close association with Britain.

In Canada, the term Constitution has two meanings. In one sense, it refers to a basic document, the British North America Act of 1867 which laid down the specific terms of confederation and established the central government for the new Dominion of Canada. And in another sense, Constitution refers to the totality of the fundamental principles underlying the legal-political system whether these are recorded in written documents or are treasured in the minds of the people. Indeed, this second meaning gets clear recognition in the preamble of the 1867 Act which declares the intention of creating a federal Union under the monarchy with a Constitution similar in principle to that of the United Kingdom. And it goes without saying that the Constitution of the United Kingdom is notably unwritten. In other words, a reading of one or two major documents cannot provide any true understanding of the Canadian Constitution which being evolutionary in character must be studied with reference to the spirit of

the entire system as it has developed. The British North America Act of 1867 with its a dozen or so amendments, cannot here take the place that can be taken, say, by the document known as the Constitution of India. There is in the case of Canada another point to be noted, much of the phraseology of the Act of 1867 has been the product of a colonial era and is now as such outmoded and bereft of any meaning. Thus while the letters of the Act and of many of its amendments remain the product of a bygone age, the spirit has changed and changed radically, so the gap between the two is enormous and must be properly attended to for a proper understanding of the present day constitutional life of Canada.

Historically, it is seen that the Constitution of Canada in the inclusive sense is based upon some statutes, many rules of common law, a number of historic declarations and a sizeable body conventions and usages. The first two of these elements are naturally legal in character and hence subjects to judicial interpretation and statutory alteration as regards both meaning and scope. And the other two elements on the other hand are essentially political in nature which the courts may or may not recognise and which operate mainly either as principles proclaimed by qualified statesmen or as the basic rules observed in practice by the people and the politicians. These, then, are subject to modification as ideas change, new concepts arise and new precedents begin.

Of the basic Statutes, two acts of the British Parliament, the British North America Act of 1867 and the Statute of Westminster 1931, in the preparation of

which the Canadian statesmen participated, are of vital importance. The first authorised the Union of the British colonies in North America, established central institutions for the new federation, and divided powers of government between the Dominion and the provinces. And the Statute of 1931 authorised repeal or amendment of any former British legislation, except the British North America Act, 1867, by appropriate Canadian legislatures. In between these milestones of high constitutional significance, Canadian statutes have been passed establishing new provinces, defining the jurisdiction of the courts, and establishing Canadian citizenship.

As regards common law, the position is that English law prevails except in Quebec where old French civil law continues for most purposes. And out of the operation of the common law arise the jurisdiction of the Crown, the rights of individuals, and the responsibility of officials for lawful conduct. Generally speaking, in all matters of public importance the Canadian apply the standard concept of common law but in recent years there has been a change of momentous import, namely, since 1949 though British precedents carry great weight, final determination has lain with the Supreme Court of Canada.

Among the historic declarations we may include the traditionally famous English documents such as the Magna Carta together with more modern ones to which Canadians have contributed at Imperial Conferences and have originated of their own. Particularly special importance attaches to the Balfour Report of the Imperial Conference of 1926 for its elaboration of the

principles of Dominion Status and definition of the British Commonwealth as an association of equal self-governing members. The Statute of 1931 followed naturally and necessarily from that declaration, though other conference deliberations also contributed to that end.

Lastly, we have to look at the conventions and usages governing the actual operation of the constitutional life in the context of a parliamentary cabinet type of government. Here also most of the customs are found to be of British origin and were introduced with the establishment of responsible government in the older colonies twenty years before confederation. To-day though the primary conventions and usages are still accepted and observed, yet it goes without saying that it now entirely depends on Canadian will. And in fact in some minor aspects of Canadian practice diverge from British usages, as might well be expected in view of the different circumstances of the two countries.

Within these limitations, then, the British North America Act of 1867 may be designated as the Constitution of Canada. The fundamental position of this Act derives from the fact that it provides the ultimate legal sanction for confederation, the Union of hitherto separate colonies and has served as the basis upon which Canada has since expanded from the original four participants to ten provinces and two territories of the present. This expansion though contemplated in the Act of 1867 was finally completed by the accession of Newfoundland in 1949.

In the light of the above analysis of the character and content of the Canadian Constitution, we may now

identify some of the principal features of that Constitution and these may be put as follows.

First, the Constitution being federal in character, the Parliament of Canada is far from being a sovereign Parliament in the sense in which Parliament in Britain is sovereign. Secondly, within the spheres allotted to each by the Constitution, the Dominion and the provincial legislatures enjoy substantial degree of power and supremacy. Thirdly, though the Constitution of Canada may be regarded as a written one, yet it does not contain a bill of rights, in this respect it being similar to the unwritten British Constitution and not to the written Constitution of the U. S. A. Fourthly, though there are no constitutionally guaranteed fundamental rights, yet the British North America Act contains certain special guarantees of minority rights in education and language, subject to which, however, the appropriate legislatures can do anything by majority vote. Fifthly, consistent with the principles of a cabinet type of government, "the separation of powers is flouted to almost the same degree as in Britain." And, finally, the principle of the Rule of Law as it operates in Britain is also an integral part of the Canadian Constitution. "Indeed, this principle has a wider recognition in Canada because a substantial, though limited, judicial review of legislation takes place." But here it "is not nearly as extensive as in the United States because so few rights are guaranteed by the Constitution and no strict separation of power operates as limitations on legislative powers," though here also, as in the United States, "judicial review rests on judicial practice



and on judicial assertion as a necessarily implied term of the Constitution.”

*Q. Write a critical note on the method of amendment of the Constitution of Canada. Is the Constitution rigid or flexible ?*

**Ans.** The position in Canada regarding the amendment of the Constitution is rather confusing and may be described in this way. “Broadly speaking, the appropriate legislature, national or provincial, can amend any portion of it except the clauses of the British North America Act establishing and defining the federal division of powers. The Dominion Parliament, by an ordinary majority, can alter any portion of the Constitution that is not put beyond its power by the British North America Act.” In 1949, the Dominion Parliament acting alone and without consultation with the provinces requested and secured from the British Parliament an amendment to the British North America Act, the amendment henceforth enabling the Dominion Parliament to change by simple majority those provisions which concern federal matters only. But this amendment kept certain matters beyond the competence of the Dominion Parliament to amend, and these were relating to the powers, rights or privileges of the provinces. Thus it is clear that the Constitution of Canada as it stands at present is partly rigid and partly flexible, the rigidity lying in the fact that certain provisions are beyond the power to amend of any Canadian authority and can only be amended by the British Parliament, and the flexibility lying in the fact

that certain provisions can easily be amended by the national parliament acting alone and by a simple majority.

Thus it may be said that the Canadian Constitution at present has two methods of amendment. But a little critical analysis will show that in reality there is a method of amendment regarding certain provisions and regarding certain other provisions there is a lack of method. For, what is really meant by saying that only the British Parliament can amend the provisions expressly excluded from the operation of the amending procedure in 1949? The real meaning is that so far as these provisions are concerned, the Canadians have failed to evolve an agreed method of proposing and ratifying amendments. That is the real point and the role of the British Parliament is purely a formal one. The Statute of Westminster, 1931, gave the Dominions full power to amend or repeal any act of British Parliament applicable to them. This would have meant full authority for Canada to amend the British North America Act. But the Canadians could not agree on the mode of exercise of that power if they had it, the provision of the Statute was not made fully applicable to Canada. Hence the saying that Canada does not possess properly speaking a method of amending her Constitution. Let us now look at the resulting position.

It goes without saying that the British Parliament will not make any amendment without the consent and express request of Canada. It has also been fairly well established that the request must come from the

Parliament of Canada. Again, naturally the presumption is against the Canadian Parliament seeking an amendment involving a change in the status of the provinces or in the rights guaranteed to the minorities without the approval of some at least of the provinces. These points may be taken for granted but the problem is that there is no agreement as to "how many of the provinces must consent to particular amendments or how that consent is to be obtained or how it is to be expressed." And naturally this uncertainty is more about the provisions deliberately kept beyond the amending procedure established in 1949.

As to the question of what is to be done when one or more provinces object to a particular amendment involving these provisions, there are many conflicting views. First, there is the view which goes by the name of the compact theory. This view looks upon the Constitution adopted in 1867 as "a contract or treaty between the separate colonies which become parts of the new Dominion and therefore no change can be made in the terms of the contract without the consent of all the parties to it." The implication of such a view clearly is that "no amendment reducing the powers of the provinces or affecting the guarantees of minority rights contained in the Act can be made without the consent of all the provinces."

But this essentially legal argument suffers from two vital defects. First, the British North America Act cannot be regarded as a contract because it contained many provisions which were determined by the British Parliament without reference to the States concerned

and the whole Act also was finally settled by the same authority. And secondly, "neither the Dominion nor the provinces of Ontario or Quebec could have been parties to any pre-confederation contract because they themselves did not exist prior to Confederation but were first brought into existence by it."

But the idea of a contract may have some real meaning if used in a moral sense and also in the sense of a contract "not between the several provinces but between the two races, English and French, which agreed to associate together in the Dominion on terms of mutual tolerance and respect." In fact, the French speaking Canadians were bent upon retaining their own control over matters of language, religion and basic social relationship and accepted a federal government only because it provided them adequate safeguards in these matters. Thus, if to-day the national parliament acting alone were allowed to take away these important rights to the provinces, it would surely be breach of faith if not breach of contract.

Secondly, there is the view that the Canadian Constitution, that is, the British North America Act has at least six different types of clauses, each type calling for its own appropriate method of amendment. This is the opinion of the 1950 Dominion-Provincial Conference. Three of these are important for this discussion.

First, there are the clauses dealing with the structure and organisation of the national government which should justly be left open to amendment by the national Parliament acting on its own. Second, the provisions dealing with the rights of race, language and religion

should not allowed to be amended without the consent of all the provinces. "Third, there is a large number of clauses which concern the Dominion and all the provinces but which are not so fundamental as to require the consent of all provinces for their amendment. Such clauses should be open to amendment by an Act of the Parliament of Canada and Acts of such majority of the provincial legislatures and upon such additional conditions, if any, as may be decided upon." Now as to what clauses fall into this third category, there is a good deal of difference of opinion. Again those who want to make the Constitution more flexible interpret that first and third categories more broadly than the second and those in favour of rigidity do the opposite. Also for the third category, some want a majority of eight of the ten provinces, some would on the other hand be satisfied with a majority of six out of the ten.

There are other views also as to the appropriate method of amendment. Without discussing them in detail, this much may be said that different bodies of opinion come to different conclusions and make any early agreement on a method of amendment improbable. There is no prospect of an early end of confusion in this respect for the simple reason that there is a wide variety of views as to what are the fundamental clauses of the British North America Act.

**16-Q.** *Write a critical note on the position of the federal Cabinet in Canada.*

**Ans.** The Constitution of Canada is federal with British type Cabinet Government both at the Union and

the Provinces. The general features of Cabinet Government in Canada are similar to those in Britain. Here also after a general election the party having a majority in the lower house of the legislature forms the Cabinet, its leader being invited by the Chief of the State to become the prime minister. The prime minister chooses his colleagues from his party and the Cabinet is responsible to the legislature collectively and severally, holding office during the confidence of the legislature. But Cabinet Government in Canada also shows certain significant differences from the British pattern.

In other words, the Cabinet Government in Canada has a few distinctive features of its own in explaining which two main reasons can be given. "First, Canada is a federation of ten distinct provinces, a fact that must always be remembered when a new federal Cabinet is being formed. Secondly, the national government in Canada, apart from emergencies of war, has never thus far engaged in a range of activities comparable to those carried on the British Governments." Some of the points of differences now may be discussed.

First, in forming his Cabinet, the prime minister of the Canadian National Government has to attend generally to the same considerations as his British counterpart but these are not his primary concern. He simply cannot go against the established usage of distributing Cabinet posts so as to give representation to the provinces and even to minorities and sections within provinces. There is a minimum representation from each province, and not only the provinces as regions but also "the sectional, ethnic and religious diversity of the country is always

recognised in the composition of the Canadian Cabinet.”

Secondly, the necessity to give the Cabinet a federal character limits the Prime Minister's choice of colleagues in two ways. On the one hand, it is often hard to find cabinet timber among the members of his party returned to the House of Commons from particular provinces or by particular minorities. Since he scarcely dares to pass them over, the quality of the Cabinet is sometimes lowered. On the other hand, by the same token, he may be compelled to pass over able parliamentarians who could almost insist on inclusion in Britain. As a result, Canadian parties often cannot maintain a group of national leaders with long experiences of parliamentary life in and out of office, Cabinet offices often going to relatively unknown men with nothing much to show as a record. Thus the Cabinet becomes not a well knit disciplined body representing the national leadership of a party enjoying a majority in the Parliament but rather an amalgam of the various interests—provincial, ethnic, religious, etc. Naturally also on national questions, the position of the Cabinet is not decided by recognised well formulated party principles but by this kind of particularistic considerations.

In this connection, another point deserves to be mentioned. The second chamber in the federal legislature was intended by the Constitution to represent and safeguard the interests of the provinces in much the same way as the Senate in the U. S. A. But unlike in the U. S. A. the second chamber in the Canadian Parliament has come in course of time to occupy a position very much like that of the British House of

Lords. But side by side, convention has so developed that "the champions of provincial interest have established themselves in the seats of power in the Cabinet", a minister always having to represent the view of the province he represents.

Thirdly, the fact that during peace time the federal government in Canada is confined within relatively modest limits of activity also has had important influence on the character and structure of the Cabinet. The size of the Cabinet here has always been small, rarely going beyond twenty and with negligible exceptions, all ministers being members of the Cabinet as well as heads of departments. In this connection attention may be drawn to certain important changes taking place during the stress of the World War II. Prior to that, the relatively light burden that had to be borne by the Cabinet made for a few important characteristics in the Cabinet. First, it made possible for the Cabinet to give much closer attention to the details of administration than was possible in Britain. Matters which in Britain may be left to the discretion of a minister required in Canada Cabinet decision. There was a strong tendency for ministers to be immersed in minor detail. Second, "the Canadian Cabinet did not find it necessary to rely to any significant extent on Committees." "Third, there was no compelling need to establish a Cabinet Secretariat." Fourth, the ministers could even do without the aid of parliamentary secretaries.

The World War II, however, changed all this demanding a level of national government activity never before contemplated and thereby compelling the Canadian



Cabinet to take to the expedients adopted earlier in Britain. There came a War Committee along with other committees of the Cabinet to deal with urgent tasks. Also gradually came a Cabinet secretariat and the appointment of parliamentary secretaries to aid the busy ministers.

Though with the end of the war, the level of activity of the national government has come down yet it continues to be higher than the pre-war one. The expedients adopted during the stress of the war are now on the way to becoming part and parcel of the permanent organisation and all these have helped the Canadian Cabinet to adapt itself to the requirements of the positive State.

**17. Q.** *Write a critical note on the relationship between the executive and the legislature under the Constitution of Canada.*

**Ans.** The relationship between the executive and the legislature in Canada is determined primarily by the logic of cabinet type of government. As a natural corollary of this type of government, in theory the executive holds office during the pleasure of the legislature. But in practice, party government ensures that the cabinet commands the attention and directs the time and energies of the House of Commons. It prepares the legislative programme and can count with confidence on the support of its majority to carry it through. It has the ultimate threat of dissolution to keep this majority in line. So far the picture presented by Canada is naturally very similar to that of Britain or to what is only to be expected in any country with this type of government.

But in Canada the phenomenon of executive-legislature relationship also exhibits certain other special characteristics not to be found in, say, Britain, and all or almost of these may be explained as due to the rather loose nature of the party organisation at the national level in Canada. Some of these features are, far less strict party discipline than in Britain, far more frequent assertion of independence of the individual member, far too many kinds of pressure operating upon the cabinet thereby making it unable, more often than not, to pursue with vigour a fixed programme, etc. These factors, however, play a more important role outside than inside the House of Commons but there also it modifies the nature of the programme that is ultimately carried to the statute-book and at least during peace time, "the government of Canada has never been noted for vigorous, far-reaching measures. Even the great depression of the nineteen-thirties did not bring a government or a policy comparable to the Roosevelt Administration and the New Deal in the United States. The executive commands the legislature but only during and since World war II has it forced the legislature to drastic measures or bulky accomplishment in legislation."

The connection between this weak government and the loose nature of the party organisation is obvious. The parties operating at the national level are "loose federations of provincial parties and the forcing of a vigorous policy by the executive would threaten the tenuous unity of its majority." "In fact, the federal cabinet in Canada has less need of a comprehensive discipline, because the positive measures to which the generalities of the party

platform commit it are fewer and less drastic than those which British parties undertake." In this connection we should not also lose sight of the fact that the government has to operate in the context of a federal framework and this necessitates a consideration by the federal government of the sentiments and susceptibilities of the provinces.

Finally, the whole tenor of the relationship between the executive and the legislature is set by their relationship in the financial field. This in the context of Canada may be described thus.

"Subject to minor variations in detail, the legislative executive relationship in financial matters in the federal government in Canada follows closely the British pattern. In Canada, the Department of finance and the Treasury Board carry out most of the functions of the British Treasury. The Treasury Board is a committee of the cabinet composed of the Minister of Finance and five other ministers who have a responsibility corresponding to that of the Chancellor of the Exchequer for settling the financial proposals subject to the final approval of the cabinet."

Here two points of striking difference are, first, the lack of use of the public accounts committee of the House of Commons in Canada and, second, use of an estimates committee only since 1956 though as in Britain, the public accounts are examined by the Auditor General who makes an annual report to Parliament.

Another very important point lies in the fact that the powers of the Canadian Senate have not been expressly made limited and hence it claims the authority

to amend or reject money bills passed by the House of Commons which, however, hotly insists that money bills are not alterable by the Senate. As regards explicit provisions of the Constitution, there is one "which provides that money bills shall originate in the House of Commons" and another "which, in effect, provides that the Cabinet alone can propose appropriations and taxations." Thus while clearly "the Senate cannot amend money bills so as to increase appropriations, its power to reduce or reject it is open to dispute and depends on subtle interpretation of the unwritten portion of the Canadian constitution." But in practice, the Senate usually does not engage in a trial of strength with the House of Commons. And that is also quite in keeping with the requirements of cabinet government which could not really function with effective responsibility to two houses, may be, of two different minds. Thus in matters of finance cabinet has rightly the pivotal role and has to satisfy only the lower house. The debatable power of the upper house in this respect has only a nuisance value the actual exercise of which is inevitably bound to be more a hindrance than a keep to the smooth running of the government and may even lead to its own eventual end.

18. Q. *Write a critical note on the civil rights in Canada.*

Ans. The law relating to civil liberties in Canada shows the strong impress of the British heritage. The basis of civil liberties in both countries is the same, the common law. What is not forbidden by the law is permitted. The law in Canada protects freedom of

religion, freedom of speech, and freedom of the press from interference by the executive branch of government. It supports freedom of the person from arbitrary arrest and detention without trial, and the freedom of public meeting. It provides the safeguards the *habeas corpus* and fair trial before courts independent of the executive under the protective procedure guaranteeing to the individual a reasonable time before trial, a definite charge, expert legal assistance, trial in an open court, any benefit of doubt going in favour of the accused, etc.

But the very fact that the Canadian Constitution is partly written in the British North America Act and its several amendments makes the Canadian situation slightly different from that in Britain. Though these written portions of the Canadian Constitution do not provide a bill of rights on the U. S. model and leave them at the mercy of the legislature, yet they do contain written guarantee for a few rights considered specially important in the context of Canada. Thus we find Section 93 guaranteeing the right of particular religious groups to separate schools, Section 133 guaranteeing the right of English or French to be used in certain public proceedings, Section 99 guaranteeing the security of tenure for the judges of the superior courts, etc. The point to note about these provisions is that they are entirely beyond the competence of any Canadian legislature, federal and provincial, and are amendable only by an Act of the British Parliament.

Another special point about the Canadian situation is that there is a difference between all other provinces

and Quebec which "is ruled by civil law as modified and supplemented by statutes of the Quebec legislature. Therefore, in so far as civil liberties fall within the legislative power of the provinces, the content of these liberties in Quebec depends on civil law-rules and on statutes of the Quebec legislature."

' However, the resulting differences between Quebec and the rest of the country are not as great as might be expected. First, most of the effective limitations on civil liberties are imposed by the Criminal law which is exclusively a matter for the federal Parliament. Second, the Supreme Court of Canada has held specifically that it is beyond the power of provincial legislatures to restrict the freedom of the press and that any such restriction is a matter solely for the Parliament of Canada. Presumably, the reasoning of the Court applies to other essential civil liberties as well and it is doubtful how far these fall within the ambit of provincial authority set out in section 92 of the British North America Act '

As regards the Canadian record in the matter of the maintenance of the essential civil liberties, three specific points may be made. First, apart from occasional attempts by the executive to interference with the civil liberties, there is also evidence to show by-passing of the legal procedure on the part of the police, use of torture to extract incriminating evidence, etc. Second, there is also evidence, to show attempt by the authorities "to put obstacles in the way of unpopular groups that are trying to distribute literature and for exercise of the freedom of public meeting." But as against these two unfavourable points, there is one good point, namely, the absence of

racial feeling and “a very high standard of fairness of trial of accused persons.”

Traditionally, the Canadian people have remained content with the position that an alert public opinion offers the best safeguard to civil liberties. But of late there has been some change of opinion expressing dissatisfaction with the existing arrangement and urging the adoption of a written bill of rights. Those advocating the change advance several arguments which are not to be dismissed lightly. Some of these arguments are : (i) the distribution of legislative power between the Dominion and the provinces on the question of civil liberties is not at all clear and this means the possibility that despite the existence of a national opinion in favour of these liberties one or more provinces may well interfere heavily with them, (ii) leaving the protection of the essential civil-liberties entirely to the charge of an alert and enlightened public opinion really requires a degree of homogeneity in the population that has not yet been attained by Canada, iii) the task of welding peoples of diverse origin and hence with diverse traditions and outlook into a homogeneous national community with a deep respect for certain fundamental freedoms will be rendered easier by the existence of a bill of rights enshrined in the Constitution.

These and similar other considerations led the Parliament of Canada to “set up a joint committee of both houses to explore the matter in 1947 and 1948. Two years later, a special Senate Committee on Human Rights and Fundamental Freedoms approved the idea (of a bill of rights) but noted that some parts of the

field of civil liberties were within jurisdiction of the provincial legislatures. Accordingly, it recommended that any amendment to the Act designed to put civil liberties beyond the control of all legislatures should not proceed without the concurrence of the provinces. Meanwhile, as an interim measure it proposed that the Parliament of Canada should enact a bill of rights covering those aspects of civil liberties which fall within its legislative jurisdiction."

While a few faltering steps are being taken to implement the recommendation of the Senate Committee, and while the force of the arguments for some kind of an arrangement that ensures the steady maintenance of the essential liberties cannot be denied, it may still be doubted if the best way to that end lies through "incorporating such rights into a charter of liberty." Negatively, it must be admitted that the actual protection of civil liberties lies in the ability of the courts to punish any violation of them by the government. And, positively, as regards the right to social security, education, just and favourable conditions of work, a standard of living adequate for the health and well being of himself and his family, it is definitely a matter of public which may ultimately see to it that "they will be provided up to the level that the intelligence, organising capacity and resources of the community make possible. Failing this, little or nothing is gained by writing the programme of the positive State into the Constitution."

To conclude, in Canada as in other western democratic countries, the traditional conception of civil liberties



is mainly negative in character. But to-day it is becoming increasingly clear that "without positive aids and supports, the freedom of the individual in a complex society may be largely illusory." "Indeed the whole development of the positive State is an assertion that the negative approach to civil liberties is not enough." But while to-day there is a very large measure of agreement on the end, the difference over the means continues and hence many difficulties and complications.

**19. Q.** *What do you mean by judicial review? Discuss its importance in a federal government.*

**Ans.** Judicial review means the power of the judiciary to determine the constitutionality of any act of the legislature and as such its validity. This means naturally the power of the judiciary in interpreting the Constitution is final and cannot be questioned so long as the Constitution remains unamended.

In a State with a written Constitution, irrespective of whether it is unitary or federal, the principle of judicial review may be shown to be necessary in this way. The written Constitution inevitably requires interpretation and to whom will this function go. It is a commonplace that both the legislature and the executive have a natural tendency to self-aggrandisement and to entrust them with the power of interpreting the Constitution may spell danger to the rights of the people. Thus the best agency for the task seems the judiciary. All these considerations again acquire a greater significance in the context of a federal system. The central idea of a federal system is a division of power between the general

government and the governments of the units, neither of which naturally can be entrusted with the power to interpret the Constitution because the result will surely be almost an invitation to the government which is given the power to seek to upset the federal balance. Thus in a federal system the need for an impartial third party to act as an umpire is keenly felt and the judiciary becomes an automatic choice.

But the principle of judicial review is not immune from criticism nor is its acceptance universal. In the first place, it is said that to allow the judiciary to declare a law passed by the national legislature null and void is tantamount to making it the third chamber sitting in judgment over the activities of the nation's freely chosen representatives. Secondly, what the judges decide are not simply legal issues but also legal issues suffused with social and economic questions. And, here, however independent and impartial the judiciary formally may be, the predilections of the judges cannot but come into play to colour their judgments. It may also be said that such a system often clogs the wheels of progress and prevents the valid enactment of necessary reforms. Further, the judgment of the Court may in some cases be by a majority of one and that means really allowing one man a veto over the nation's social and economic philosophy.

No one can deny the force in such contentions. But at the same time it must also be said that on the other side also powerful considerations can be urged. In the first place, the substance of the matter is that while it is the duty of every institution established under the

authority of a Constitution and exercising power granted by a Constitution to keep within the limits of these power, it is the duty of the Courts, from the nature of their function, to say what these limits are. And that is why Courts come to exercise this function in a federal government." Again it may also be pointed out that "the exercise of this function by Courts is not confined to countries with a federal government. It is found in a country like the United Kingdom, whose government is usually called unitary, for there the Courts have the power—unless it has been expressly withdrawn from them by law—to say whether a governmental institution is acting within the limits of its power." Secondly, even acknowledging that social and economic predilections of the Court do play a part in deciding points which are ostensibly only legal issues, it must be seen that the system of judicial review is really a habit of submitting to an impartial and independent tribunal all questions likely to excite popular passion. If it is said that the opinion of Court often goes against the currents of public demand and opinion, it can be said in all fairness that democracy by no means implies that the voice of the people is always to be treated as the voice of the gods. Looking at it from a practical point of view, there is really no way of avoiding conflicts of this sort.

Of course, the principle of judicial review is not universally accepted. It may be argued with perfect logic that "what is essential for federal government is that some impartial body, independent of general and regional governments, should decide upon the meaning of the division of powers. It happens that in the United

States and Australia the highest court of the land has had the last word in the matter and that, on the whole, it has proved independent of the rest of the general government." But the example of Switzerland shows conclusively that the system of judicial review is indispensable to a federal system. So before we reach the final opinion on this point, a brief examination of the alternative to judicial review as shown by Switzerland is necessary.

"The Swiss alternative is that the courts must accept the laws of the legislature as valid and that those who do not like them may unite to have them referred to the people in a referendum." Though there is no denying that this system works in Switzerland with fair success, yet the question whether the same degree of success may be anticipated in other countries is by no means irrelevant. And what is more, this system really amounts to providing us with another mode of constitutional amendment. For in such a system the Swiss "general legislature may pass a law which conflicts with the Constitution. That law may not be questioned at all and in that case it comes into full effect and the Constitution is to that extent amended." Again, the arrangement to leave the whole thing to public opinion which will punish any attempt by the legislature to act beyond its competence through referendum or through general election, may be perfectly democratic in form and intention but it ignores the question of the protection of a minority. Though it may be said that all these are political questions and hence should not be allowed to be decided by the Courts and should properly be decided by some specially

constituted body, yet even in that case the basic difficulty remains

To conclude, it cannot be said that judicial review is indispensable to a federal government. The Swiss system of government has been able to maintain both federalism and good government without judicial review. But nevertheless, it must be seen that the question really involves two points, one, both the general and the regional governments must be kept within their respective constitutional grooves and, second, an impartial and independent agency for interpreting the meaning of the Constitution is essential. The task may be performed in different countries by different agencies, the main determining factor being special circumstances of each case. Thus while it may be asserted that the Swiss system, though difficult, will not be changed by the Swiss people and equally where judicial review exists, it, with all its admitted drawbacks, is strongly entrenched.

**20. Q.** *Discuss critically the case for Bi-cameralism in a federal system with special reference to the Constitutions of the U. S. A., U. S. S. R. and Switzerland*

**Ans.** Whether the legislature of a State should have one house only or two houses is an important question and on both sides we find important arguments as well as names. Generally, the case for bi-cameralism, irrespective of whether the State is unitary or federal, is put on the grounds of the necessity of having a revising body, the necessity of having a check against hasty and ill-conceived legislation, the necessity of providing proper and adequate representation to some special

interests likely otherwise to go unrepresented, and finally the necessity of not having any legislature in a position of unchecked and unchallenged monopoly of power. This device of a second is alleged to be specially necessary in a federal State where it is designed and looked upon as an instrument for the protection of the interests of the units. Being here specially concerned with the justification or otherwise of the second chamber in the context of a federal State, let us examine the argument that is advanced from that point of view.

The principal argument in favour of a second chamber in the federal legislature is that the first chamber being constituted on a population basis, in that chamber those States with more population will naturally have more representatives than those with smaller populations ; and under the circumstances, the absence of a second chamber with equality of representation granted to the States, will clear the way for the larger States to band together and ride roughshod over the smaller ones.

This is the basic argument urging the vital need of having a bi-cameral federal legislature and the argument or more correctly the end which the argument professes to safeguard cannot be dismissed lightly. But then before the argument is accepted as finally convincing, we must see (i) whether the interests that a second chamber is designed to protect in a federal State is already safeguarded otherwise, (ii) whether, in actual practice, the second chambers in the federal States like the U. S. A., U. S. S. R. and Switzerland, do actually represent the States and vote accordingly, and finally

(iii) whether the advocates of bi-cameralism, can provide satisfactory answers to certain practical questions inevitably raised by a system of bi-cameralism.

As regards the first, the following may be said. The federal arrangement is always specifically written down in a document, the constitution which is made difficult of amendment and which is accepted as the basic law of the country. This constitution divides power between the general government and the State governments and also takes concrete steps for maintaining that division of power. One such step is that there may be a special court for the protection of the constitution and its division of power; and another is that the method of amendment of the constitution is made such as to require, for any change in the constitution, the participation and agreement of both the union and the units. In sum, it may not be far from the truth to say that a federal system has some built-in arrangements for the protection of the interests of the units and a second chamber in the federal legislature may become an added complication, if not wholly unnecessary.

Coming to the point of actual practice, the experiences of the three federations may be briefly described as follows. In the U. S. A., the Senate which is rightly regarded as the most powerful second chamber in the world owes its position of prestige and power not due its being representative of the State but primarily due to other factors. It was designed not only as an instrument to protect the interest of the States, but primarily as check on the powers of both the President and the other house of the federal legislature. That is why it

was given by the Constitution many important powers which were denied to the lower house, the House of Representatives. Also, its composition, term, etc have all tended to elevate it to a position which may be called superior to that of the other house. Also, since 1913 when the provision was made through a constitutional amendment for its direct election it acquired a popular basis and this contributed still more to its pre-eminence. But despite all this, it cannot be said that the Senate has been very much concerned with what is supposed its chief reason for existence, and that is because the development of the party system has shifted the whole question on to a different plane altogether and records show the members of the American Senate to vote according to party principles and not as representing their State.

In Switzerland also, the second chamber in the federal legislature is constituted on the same principles as in the U. S. equality of representation of the units. Here the two chambers have in theory equal powers but in practice the lower house is superior. Here two points are to be specially noted. One is that the lower house having a fixed term and the upper house having terms varying from canton to canton, there is naturally a preference for membership of the house with a fixed term which thus comes to acquire some added influence though it is extra-constitutional. And the other and more important point is that "theoretically, the Senators are to safeguard the interests of their cantons, but Art. 91 forbids them from acting in accordance with Cantonal instructions." And also




“the effectiveness of other institutions for safeguarding constitutional rights—particularly the referendum—has meant that the legislature as a whole is less important.”

In the Soviet Union also, the federal legislature is made bi-cameral and in the upper house equal representation is granted to the units which, however, have been classified into a few types. There is not equality of representation between the classes or types, but there is equality within each type. Theoretically it represents the units of the federation and its function may be to safeguard the special interests of the units. It has been given by the Constitution co-ordinate status and equal power with the lower house. But just as in Switzerland, other institutions detract from the importance of the legislature as a whole, just so in the U. S. S. R. the whole of the formal governmental machinery is under the shadow of the Party which, in its turn, is dominated by the will of its top leadership.

Finally, we come to the question of practical difficulties. What is to be the basis of organisation, election or nomination? If it is election, is it to be direct or indirect, and if direct, what is to be the basis of representation? Again, as regards competence, whether the second chamber is to be superior or inferior or equal to the first chamber. These and others are some of the questions which are an integral part of a bi-cameral system and these also are present in a federal State also, and its advocates do not seem able to provide quite satisfactory answers to these.

To conclude, bi-cameralism in a federal State by no means seems indispensable because, as shown by the

cases of the U. S. A., U. S. S. R., and Switzerland "the upper houses have not fulfilled this particular function with much success." This shrewd suspicion is strengthened by the consideration "whether the complication of the constitutional machinery, the obscuring of ultimate power relationship, the disturbance of the unity of party, and the checks and brakes upon government, are together worth the security given by a second chamber. That security is of no value unless it implies the introduction of sobriety and wisdom into government." Thus in theory it is indeed difficult to sustain the case for bi-cameralism even in a federal State. The most that can be said in its favour is that "wherever there are material or spiritual interests which desire defence against the grasp of the majority, a bi-cameral system will be claimed; for even the mere deferment of an undesirable policy is already gratifying deliverance."

 *Is separation of powers essential in a federal system?*

Ans. The functions performed by a government may naturally be divided into three kinds, namely, making the law, enforcing the law and settling disputes according to the law. And for these three kinds of functions, we find three different branches or organs of government, namely, the legislature, the executive and the judiciary. Now the question is, though the three functions may be looked at as essentially different in character, what is to be the relation between the three organs performing them? The theory of separation of powers is one answer to that question, the answer being that the

three organs are to be made separate and independent of each other.

This theory of separation of powers has exercised a profound influence upon democratic political theory and practice and it has been argued that in a federal state the general government should be organised in accordance with this principle. Before we can accept the value of this argument, we have to see the implication of the theory of separation of powers in general as well as its influence on a federal system including its contribution to the success of the federal system of government as shown by actual experience.

Generally speaking the theory of separation of powers is open to many objections which may be put as follows.

First, the theory logically implies the equality of status of the three organs, whereas in a democracy the legislature as the immediate sovereign under the Constitution must be accorded with some amount of superiority and "the powers both of executive and of judiciary find their limits in the declared will of the legislative organ."

Secondly, government is really an organic unity. "Separation of power must certainly mean a distinction of modes of action. But even if there is thus plurality of modes, there is also, we have to remember, a great and general mode of action which is common to the whole of government, and which blends the different modes in a unity of operation. The fact of this unity stands behind the difference of particular modes."

Thirdly, though advocated as a safeguard of liberty, yet experience shows that the contribution of the device in that respect is really much too much exaggerated.

Fourthly, though besides those already mentioned, a few other arguments also may be given to show that the application of the theory is really highly undesirable, yet assuming otherwise, it can be shown that an application of the theory in a thoroughgoing manner is just not practicable. And to corroborate such a contention there is the classic example of the U. S. A., where the most ardent attempt was made to make it the foundation of the country's constitutional system but in vain.

Now let us see how far the different federal Constitutions including that of the U. S. A. have accepted the theory and with what results.

In Switzerland we know there is no separation of powers. The executive has the right to participate in the proceedings of the legislature and the executive, though in theory entirely a creature of the legislature, yet in reality plays the role of leader and guide. The legislature also has powers that are not only legislative in character but also have other aspects too. In fact there is no separation of powers and this absence cannot be said to have had any adverse effect on the maintenance of either the federal system or the rights of the citizens.

In the U. S. S. R. there is open rejection of the principle of the separation of powers. In the face of it, the Soviet Union has a parliamentary system of government and it is obvious that a parliamentary government is a negation of the theory of separation of powers. Of course, how far the federal character of the Soviet Constitution is real in practice or how far the citizens there actually enjoy the rights solemnly guaranteed in the Constitution may be debatable but certainly one

cannot say that these questions are in any way linked with the presence or absence of the separation of powers.

In the Constitution of the United States, however, the principle of the separation of powers has been accepted as a basic one. The Constitution vests all legislative powers in the Congress, all executive power in the President and all judicial power in one Supreme Court and in such inferior Courts as Congress may from time to time ordain and establish. But even here we find a recognition in the Constitution itself that the full application of the theory is neither practicable nor desirable, for, in the Constitution itself there are numerous provisions for joining what have been previously separated. The President is associated with Congress in the exercise of the legislative function by his veto power ; the Senate is associated with the President in his executive functions in that its consent is necessary to his making treaties and to his making certain important appointments.

As to the results of the acceptance of the principle of separation of powers, "Its general effect is to weaken government and a weak government is sometimes considered desirable by the units which form a federal Union." And as Laski says, "The American system, in its ultimate foundations, is built upon a belief in weak government." However, this separation of powers may be seen to have in the U. S. A. one good point, namely, "It holds the federal Union together because it provides so many obstacles to the carrying out of policies which are not strongly supported by a large body of organised political opinion. This obstructionism, this conservatism,

this indecisiveness in the American general government, is a guarantee to all the units in it that nothing will be done to which they object very strongly."

To conclude, "Montesquieu's mistaken view of the relation between executive and legislature in England, consecrated as it was by Blackstone, led to the theory that no bridges ought to be built between the organs which represent these various powers." But to-day "the moulds have broken in which the thoughts of Locke, Montesquieu and Madison were cast and their contents have spilled together." Perhaps the only points of value in the theory for our times and conditions are that, first, concentration of power is always a menace to rights and secondly, maintenance of rights may well depend to a large extent on the separation and independence of the judiciary from the other branches of government. Applying this general principle in the context of a federal system, we may say, first, that federalism certainly does not demand separation of powers; secondly, that it may be wise from a practical point of view for a federal government not to be based on separation of powers because that would mean further weakening of an already weak because of limited government; thirdly, that in a federal State it may be necessary to separate "the judiciary in the general government from the other branches of the government if it is the tribunal which decides disputes about the meaning of the division of powers." But even this limited amount of separation, though usually accepted in most federal systems, does not go very far because "there is a connection from the fact that members of the judiciary

are appointed and removable by either the executive or the legislature or a combination of both."

*Q. Is the growth of federal power and responsibility inevitable under modern conditions ?*

**Ans.** The most important characteristic of a federal system of government is a constitutional division of power between a general government and a number of regional governments, each of which is independent within its constitutionally allotted sphere. The legislatures of the general government as well as of the regional governments have in a federal set up limited powers and the idea is that both are co-ordinate in status. But of late, it is seen that this idea of federation is undergoing a process of radical change which modifies its basic character. In almost all the federations of the world, the general government is seen to acquire more and more functions, powers and responsibilities, as a result of which the regional governments are definitely losing their co-ordinate status, in fact if not in theory and are reduced to a position of subordination and dependence. The factors responsible may be analysed as follows.

"Whenever government is decentralised, functions must be assigned to the level at which they are most appropriately conducted. How is this appropriateness to be gauged ? The problem is to work out a relationship between four factors—people, areas, fiscal resources, and governmental services. The ideal would be to create for any governmental service an area in which the residents possess the fiscal resources to maintain the service. Most of the modern modifications of federalism

are due to the emergence of social needs, for which the political boundaries drawn in an earlier, pre-industrial society are inadequate. If business corporations and trade unions become big, developing a nationwide organisation and producing goods that will move across statelines, it is evident that labour relations can no longer remain within the jurisdiction of the States.... Powers continue in theory to be distributed as constitutional law would have them. But the modern requirements of the governmental processes are knitting the fragments together."

Again, behind the modifications of federalism, there are not only factors of national origin but also there are what may be termed international factors. The two world wars and the ever present possibility of another have an unprecedented impact on federalism. "Because of the military need for unified command, co-ordinated plans, and prompt action, an era that places the accent upon defence is ill-suited to the maintenance either of checks and balances between branches or of rights of States vis-a-vis the government of their nation. A dispersion of powers is incompatible with the troubled politics of a world that is scarred by past wars and scared of new ones."

"The conclusion seems unavoidable that older patterns of decentralisation—whether in the form of local autonomy under a unitary system or of States' rights in a federal Union—were doomed to dissolve in the corrosive acids of twentieth-century politics, economics and technology. Virtually all the great driving forces in modern society combine in a centralist



direction. The political urge for equality of rights, and greater equality of treatment; the extension of the market, increased standardisation of products and the growing uniformity of taste, the quest for social security and economic stability; the tensions of military preparedness and the technology of warfare in an age of jet propulsion and atomic energy—such conditions do not harmonise with separated powers and scattered jurisdictions. Different levels of government can no longer be thought of as independent in their respective spheres. Either one is dependent on another or they are mutually interdependent. Though great differences in degree still exist, the unmistakable tendency of our century is to integrate and centralise.”

Such a contention can easily be corroborated by a look at actual developments in, say, the U. S. A., Switzerland, U. S. S. R., etc. As regards the developments leading to the modifications in federalism in the U. S. A., the following may be said : “The twilight zone between national and State powers has been obliterated. The distinction between production and commerce has been done away with. The methods of co-operative federalism have been accepted, the use of national grants-in-aid to bribe, as critics put it, the States into doing certain things in certain ways has been sustained. The troublesome issue of intergovernmental tax immunity, that is, the extent to which one level of government may not tax the instruments of the other, has been dealt with by leaving a large measure of discretion to the Congress. The long standing rule that whenever otherwise valid national and State

regulations conflict, national law overrides State law has been rigorously enforced. Since 1937 in short, the court has sustained national action against every claim of impingement on States' right."

A regards the growth of centralisation in Switzerland, we find that "the forces of war, economic depression, the demand for ever-increasing social services and the mechanical revolution in transport and the technological revolution in industry, have persistently promoted this tendency towards centralisation" here also. In a matter of one hundred years, Switzerland has been transformed by force of circumstances from a loose confederation to "a centralised federation drawing its strength not from the sovereign cantons but from common nationalism." And it is apparent that in this development the need to maintain independence and neutrality has played a role which is at least equal in importance to all the other social and economic factors. And discussing the power of the general government in Switzerland over the economic affairs, Prof. Wheare says that there has been a steady and substantial increase in the economic powers of the general government.

Coming to the Soviet Union, we find the Constitution already makes for a strongly centralised federal government so much so that Prof. Wheare is not prepared to call it more than a quasi federation. His objection to calling it a really federal State rests on the grounds that, first, the union legislature alone can amend the Constitution, second, that "the powers of the All-Union authorities include the confirmation of the unified State budget of the U. S. S. R. as well of the

taxes and revenues which go to form the All-Union, the republic and the local budgets.” and third, that “Article 14 gives to the All-Union legislature such comprehensive powers over almost all sphere of life that it leaves little to the constituent republics, if the All-Union chooses to exercise them to the full.”

In the U. S. S. R., of course, one or two developments have taken place which may be construed as exceptions to this persistent trend that we have been describing, namely, that of increased centralisation. For example, “in 1944, the Supreme Soviet of the U. S. S. R. extended to the each of the then existing sixteen Union republics the power to conduct its foreign relations, within the limits of policy established by federal government, and to establish military formations of its own, within limits established by the federal government.” This is certainly a move against centralisation but the motive was to ask for as many seats in the soon-to-be established United Nations and it is now common knowledge that Stalin actually tried just that and obtained independent seats in the U. N. for Ukraine and Byelorussia. But record also shows the policy of these two is tightly controlled from Moscow.

And since the death of Stalin, however, there is a clear shift which may be described as follows. Instead of an ever increasing number of Union republics, there has been a decrease, and there are further signs of merger. The Karelo-Finnish Republic was demoted in 1956 from Union status to autonomous status, losing in consequence its Union republic quota of delegates in the second chamber of the Supreme Soviet and subordi-

nating its administrative departments to the Russian republic into which it was merged.

While no other Union republic has been merged since that time, there is evidence of a desire to establish the conditions for merger, at least of economic and political controls, if not of territory. The economic affairs of the five Union republics located in Central Asia were merged in 1962 under the direction of Central Asian Regional Economic Council authorised to co-ordinate their economics.

“Political consolidation was initiated in 1963 in the three republics south of the Caucasus when communist party activity within the three republics was placed under unified control through the creation of a Trans-Caucasian Bureau of the Central Committee of the party.”

Indeed, the trend towards centralisation in the U.S.S.R. works through two main instrumentalities, that of centralised economic planning and unified control in all matters through the top leadership of the party. Again, control of the centre to-day exercised through these two is strengthened rather weakened through the recognition of rather cultural autonomy to the regions and ethnic groups. And Central control is so thoroughly established that it is said that “the pattern of the U. S. S. R. as established in 1963 could be changed in the interest of increased economic efficiency without fear of causing political unrest.”

To conclude, the tendency towards centralisation in all federations is unmistakable, yet it should not be taken to mean that this has taken place at the formal

curtailment of the power of the units as originally granted under the constitutions. Rather centralisation has taken place far less by the withdrawal of the regional governments from certain fields of activity than by the entrance of the national governments into fields previously almost exclusively dealt with by the other governments, if dealt with by governments at all. What is happening everywhere is that strands of functional union are crossing lines of geographical subdivisions in increasing numbers, knitting national societies closer together." However, "in every society the pattern is different, and even within a society, the development is rarely uniform. Knots of resistance arrest and modify the centralising tendencies and a confused pattern emerges."

*Q. Compare and contrast the principles of federalism in Switzerland with those of the U. S. A.*

**Ans.** The essential features of a federal system may be described in this way. First, the system is characterised by the existence of two parallel sets of government, that of the Union and those of the Units, each performing specific functions within the respective limits prescribed by the Constitution. Secondly, of all the matters of government, there is a division in two parts, one for the Union and the other for the Units. Thirdly, this distribution of power is made through a Constitution which is written, rigid and accepted as the supreme law of the country. The written and rigid character of the Constitution derives from the intention to maintain as permanent the arrangements made by the Constitu-

tion by keeping both the Union and the Units strictly within their prescribed areas. And its character of the fundamental law of the land derives from the fact that the entire political machinery at all levels draws its power and authority from the Constitution which sets a clear limit to what can and cannot be done. Fourthly and finally, because the entire political machinery revolves round the Constitution, the need is felt for an agency to look after its maintenance and interpretation, and for this function, a special court is created charged with the business of interpreting the Constitution, protecting it against invasion from any quarter, acting as an impartial umpire in all cases of dispute between the Union and the Units or between the Units themselves regarding their respective constitutional power and jurisdiction.

In the light of these usual features of federalism, it is easy to see that Switzerland, despite its being a confederation in name, is really a federal State and as regards the U. S. A. it is needless to say any thing because it is almost universally accepted as a model of federalism. Thus the fact that both the United States and Switzerland are federal States indicates that in the constitutional systems of the two certain similarities are bound to be there. These similarities derive not only from their both having the same constitutional type but also from the fact that the Swiss reforms of 1848 and 1874 to a certain extent consciously imitated the U. S. constitutional pattern. These similarities may be described as follows.

First, in Switzerland, the scheme of distribution of

powers between the Union and the Units is like that of the U. S. A. The Constitution describes the powers of federal government, and leaves all powers other than these with the cantons, the Units. The powers of federal government may be classified into exclusive and concurrent powers. In case of any conflict between the federal government and the Units in respect of any concurrent power, the power of the former will be allowed to override that of the latter.

Secondly, the Swiss system also exhibits the supremacy of the Constitutions as well as its rigidity. The Constitution is supreme but is left open at every point to an absolute democratic check through the instruments of referendum and initiative. In Switzerland, thus, the task of protecting and interpreting the Constitution has not, as in the U. S. A., been given to a federal Court. And the rigidity of the Constitution is evidenced by the fact that any amendment needs to be ratified by a majority of the cantons as well as by a majority of the people through nation-wide referendum.

Thirdly, Switzerland also shows the existence of a federal court which, though without the power of interpreting the Constitution, acts as the final court of appeal and has the authority to settle all cases of dispute between the cantons.

Thus in all these points, the similarity of the Swiss and the U. S. systems is evident. But the two systems do not show similarity only, they show certain differences too. These points of difference may be described as follows. First, the executive power which in the U. S. A. is with one single individual, in Switzerland

rests with a group. Secondly, the executive in the U. S. A. is elected by a special electoral college but executive in Switzerland is elected by the legislature. Thirdly, the Swiss cantons enjoy greater freedom than the States in the U. S. A., because the former enjoy the power of making treaties and agreements with foreign countries, a power not enjoyed by the latter. Fourthly, in Switzerland, there is a security of rights, both national and State, which does not exist at all for federal purposes in the U. S. A., namely, the referendum. Fifthly, the Swiss Constitution, despite its theoretical rigidity, is in practice capable of much easier amendment than the Constitution of the U. S. A., the referendum and the initiative being perhaps the most important contributing factors in this regard. Sixthly, while the Swiss Council of States, like the U. S. Senate, provides equality of representation to the Units, unlike in the U. S. A., where, there is a constitutionally prescribed uniform method for the popular election of the members of the Senate, the Swiss Constitution leaves every detail of their selection and period of service absolutely to the cantons. And finally, perhaps the most important difference between the two systems is shown in the difference between the two federal Courts. The Swiss federal Court, lacking any power to declare on the validity of a law passed by the federal legislature on the strength of its interpretation of the Constitution must pale into insignificance by the side of the U. S. Court which enjoys almost limitless power in this regard, the Constitution being, in a real sense, what the Supreme Court says it is.



Now, if we take the U. S. Constitution as a model federal Constitution, it is clear that the Constitution of Switzerland, or any other federal Constitution for the matter of that, departs from the model in important respects. But that does not and indeed need not detract from their federal character, because it is clearly inappropriate to look upon federalism as a finished formula with an element of finality about its meaning and necessary implications. It is rather to be looked upon as a working hypothesis, a general pattern for striking a balance between the forces the unity and those of diversity, and thus this can be accomplished in many different ways depending on the actual exigencies of situation as they obtain in different countries, without questioning the basic idea of the pattern. Thus the fact that federalism in different countries shows different faces is only natural expressing the different ways chosen by the genius of different peoples and cultures.

**Q.** *Compare and contrast the U. S. and the Soviet federalisms. Is the Soviet Union a truly federal State ?*

**Ans.** Both the U. S. A. and the U. S. S. R. have federal systems of government. But though both are federal States, they are by no means similar in all respects and have plenty of points of differences also. Their points of similarity and differences may be described thus.

The two systems are similar, firstly in that in both power has been distributed between a Union and a few Units through the instrumentality of a written Constitution. Secondly, in both the powers of the Union

have been clearly enumerated and all the powers, not clearly given to the Union, have been given to the units. Of course, in the United States, through the device of the judicial review, the enumerated powers of the Union have come to be of two types, exclusive and concurrent. As regards the latter, the units can act only when the Union has not already acted or when such action by the units does not go against the action taken by the Union. In the Soviet Union this concurrent sphere is not found but somewhat analogous is the power exercised by the Union-Republican Ministers. The power exercised by these ministries is mostly of a joint character and exercised through the appropriate ministries of the Union Republics. Thirdly, in both cases, the supremacy of the law of the Union is constitutionally recognised. Fourthly, in both cases, the units have their own Constitutions, governments of their own choosing, and their own citizenship. But again in both cases, while the units have the right to make and change their own Constitution, they must, in exercising this right, act in full conformity with the national Constitutions. Fifthly, in both cases, any change in the territorial boundaries of the units cannot be brought about without the express approval and consent of those concerned. Sixthly, double citizenship is another feature which is common to both the States. Seventhly, in the U. S. A., the upper house of the federal legislature, the Senate provides equal representation to all the units irrespective of size, or population or resources, because it has been designed mainly as a check against the larger States combining to dominate over the smaller ones. In the

Soviet Union also essentially the same arrangement has been made, with the difference that the units have been divided into four classes, each member of a class being given equality of representation though there is a difference in representation between the classes.

Now, coming to the other side, the differences between the two systems, the following points may be made. First, the Constitution of the U. S. S. R. recognises the rights of the units to secede from the Union but the U. S. Constitution does not recognise any such right of the units and creates what has been designated as an indestructible Union. Secondly, in the U. S. S. R. the power to amend the Constitution rests with the Union legislature which can do so with the help of a two-thirds majority in each House. But in the U. S. A. the power to amend the Constitution rests neither with the Union alone nor with the units alone. Besides, in the Soviet Union there is the provision for referendum for which, on the demand of any Union Republic, the Presidium must arrange and in the U. S. A. there is no such arrangement. Thirdly, in the U. S. A. there is the system of judicial review the result of which has been that the final power of the interpretation of the Constitution as well as the power to judge the constitutional validity of any law, national or State, are with the Supreme Court. But in the Soviet Union, the judiciary has not been given the power of final interpretation of the Constitution which rests with the Presidium of the Supreme Soviet. Fourthly, the Supreme Soviet of the Soviet Union has the power to make any change in the constitutional status of the units but no such power is enjoyed by the U. S. federal legisla-

ture. Fifthly, the units in the Soviet federation have the rights, constitutionally recognised, of maintaining their own armies, their own foreign relations, etc.; but in the U. S. A. the Constitution does not give any such right to the units. Sixthly, in the Soviet Union, the financial power has been concentrated in the hands of the Union while in the U. S. A. financial power also has been constitutionally divided between the Union and the Units.

Finally, in view of the many points of difference between the two systems, there are some who are not prepared to concede the claim of the Soviet Union to be a real federation. Their main targets of criticism are the existence of only one officially recognised party, of a totalitarian political system as well as a totally planned political economy making inevitably for a great deal of centralisation, in practice if not always in theory. In reply, however, it may be said that there can hardly be one universally accepted model of a federal system irrespective of time, place and circumstances. Also, some kind of economic planning and some kind of extension in the functions and control of the State can be seen in the U. S. A. too where, all agree, many strongly centralising tendencies are in operation the result of which is profound modification of the federal character, in practice if not in theory so far.

"Federalism is thus not an absolute but a relative term, there is no identifiable point at which a society ceases to be unified and becomes diversified. The differences are rather of degree than of kind." In short, "Federal government is a form of political and constitutional organisation that unites into a polity a number of

diversified groups or component polities so that the personality and individuality of the component parts are largely preserved while creating in the new totality a separate and distinct political and constitutional unit." Thus it is clear that really there is no ground for excluding the Soviet Union from the category of federal States except by manipulating definitions so as to exclude Soviet Union or any other State as a matter of course.

• Q. *In the U. S. S. R. the party is the government except in form.* Discuss.

Or,

*Discuss the role of the Communist Party in the Soviet Union.*

Ans. The Communist Party of the Soviet Union is in some respects unique and different from its western counterparts. This is but natural in view of the different historical setting in which it had its being and becoming and also in view of the different role it chose for itself. In the days before the Revolution, the Party was small and for easily understandable reasons. A party with the avowed object of making a violent and total revolution needs people of a type not found in large numbers, or found easily. And also naturally such a party cannot have the same degree of internal democracy as a party working legally in a democratic system.

After the revolution, the first and the most important task of the Party naturally became the defence of the revolution against its various enemies, both internal and external. And the other equally important task of the Party became to serve as inspiration, example and educator of the people and to lead and direct the func-

tioning of the government with an eye to establishing a classless society in which there is no exploitation of man by man.

In theory, the Soviet Union is a parliamentary democracy, like any other such State. In practice, however, there are important differences. The most important point to note in this connection is the overriding and all pervasive control of the Party which is the only official permitted party, the organisation of any other party being legally not permitted. In every matter, the Party decides what, when, how, is to be done,

Another important function of the Party is to serve as the link maintaining contact between the people and the government and to serve as the medium of exchange of information and opinion between the people and their rulers.

The control of the Party over the State is complete, this control being exercised in the following manner. First, all the highest administrative officers and the great majority of the Supreme Soviet belong to the Party. Secondly, it has the power to issue directly legislative and administrative directives. And finally, every organisation, trade union, collective farm, etc. includes a unit of the party which makes sure that the organisation follows the right path.

No discussion of the Party in the Soviet Union is complete without a reference to the working of the Central Committee of the Congress of the C. P. S. U. It contains over 100 members who elect from among themselves a Central Committee to keep watch over all subordinate organisations of the Party. It also elects a

Presidium and a Secretariat. In this connection, it may be mentioned that the Central Committee has to approve the country's economic plan and generally the policies put before the Supreme Soviet and the Council of Ministers. It is the business of the Secretariat to collect and organise information necessary for this purpose. In this way, the Secretariat grows in size and in the number of departments and becomes almost a parallel government and the office of the First Secretary becomes very important politically. It is interesting to note that this was the post held by Stalin for thirty years, that is, from 1922 till his death and he "did not formally unite in his person the leadership of the Party and the State until the spring of 1941." This Secretariat under the First Secretary comes to dominate the Party for all practical purposes.

From all this, the role of the Communist Party in the Soviet Union is evident. And the programme adopted in the twentysecond Congress of the C. P. S. U. declares that Socialism has been fully established in the Soviet Union and in consequence, the Communist Party has been transformed into the party of the whole people, which will now take the central role in ushering in a Communist Society. So the Party remains and remains with added responsibility, functions and naturally, powers.

To conclude, the supremacy of the Party over all aspects of Soviet national life, political, economic, social, cultural, etc. was never in doubt and it is still so. It may be said that "Stalin had, in fact, allowed the Party's authority to lapse somewhat", but "the Party's prestige, influence and direct responsibility have been

strengthened, first of all because Khrushchev relied on its apparatus to establish his ascendancy over his rivals. Khrushchev elevated the Party again above the competing networks of functional specialists...He has repeatedly emphasised that in the period of transition to "Communism" the State will indeed begin to wither, with a concomitant gradual transfer of responsibility for self-government to social organisations. The Communist Party, as the outstanding "social organisation" will thus acquire an even more important part to play. The obliteration of strict divisions of responsibility between the Party and government is a conspicuous step toward the withering of the State. It also attacks the perennial problem of reconciling political-ideological with technical-managerial interests. Given the character of the Soviet system, which precludes competitive politics, this is probably the central issue for the political leadership to resolve and there are no pat answers...In short, the Party remains the prime mover of society and the source of all authority. It stands outside and above the law, and while it now rules with judicious restraint, it alone determines the limits of its legitimate actions."

**Q.** *"We no longer live under a genuine federal government in the United States."* Discuss.

**Ans.** The most important characteristic of a federal system of government is a constitutional division of power between a general government and a number of regional governments, each of which is independent within its constitutionally allotted sphere. The legislatures of the general governments as well as of the



regional governments have in a federal set up limited powers and the idea is that both are co-ordinate in status. But of late it is seen that this idea of federation is undergoing a process of radical change which modifies its basic character. In almost all the federal systems, including that of the United States, it is seen that the general government is coming to acquire more and more powers, functions and responsibilities as a result of which the regional governments from a co-ordinate status are reduced almost to one of dependence, at least of subordination. Such an important change is attributed to certain forces said to be operating as part and parcel of a modern industrial society. These forces are, in the picturesque wording of Prof. Wheare, power politics, depression politics, welfare politics and the internal combustion engine.

In the United States, this process of what has been called federal centralisation, has worked through judicial decisions, constitutional amendments, financial participation of the general government in regional affairs and development of Union-State co-operation.

In this connection, we may refer to the 14, 16 and 18th amendments of the Constitution which generally add to the powers of the federal government. Originally prohibited by the Constitution from levying direct taxes except under certain rigid conditions, the federal government has been empowered by the 16th amendment to lay and collect taxes on incomes, from whatever sources derived, without apportionment among several States and without regard to any censuses or enumeration. Secondly, the Supreme Court has developed the principle

of implied powers which has been used to sustain federal laws coming in conflict with the reserved rights of the States. In fact, the Supreme Court has almost consistently interpreted the Constitution in favour of the federal government thereby adding to its prestige and powers as against those of the States. For example, the 'commerce clause' as interpreted by the Supreme Court is today an ample source of federal legislative authority for dealing with a wide range of problems arising out of or having any substantial effect upon inter-State commerce.

Thirdly, the federal government controls the economic affairs of the States in a number of ways. From the time of President Roosevelt a large measure of economic regulation on the States has been imposed. There have been since then various laws for congressional control over the economic affairs of the country. For promoting national economic welfare several agencies were set up such as Public Works Administration of 1933, the Tennessee Valley Authority of 1933, the Farm Security Administration of 1937, etc. Besides, the extensive system of federal grants has increasingly brought the States under the financial control of the Union.

Fourthly, in recent times, there has developed a wide area of effective co-operative co-operation between the national government and the States and also in many cases between national and local governments. This is called co-operative federalism which inevitably tilts the balance in favour of the national government.

In short, "the twilight zone between national and State powers" has been obliterated: the distinction

between production and commerce has been done away with. The methods of co-operative federalism have been accepted, the use of national grants-in-aid to bribe, as critics put it, the States into doing certain things in certain ways has been sustained. The troublesome issue of inter-governmental tax immunity, that is, the extent to which one level of government may not tax the instruments of the other, has been dealt with by leaving a large measure of discretion to the Congress. The long standing rule that whenever otherwise valid national and State regulations conflict, national law overrides State law has been rigorously enforced. Since 1937, in short, the Court has sustained national action against every claim of impingement on States' rights."

There are also certain important social and economic changes in the life of the people. For example, the spread of motor transport, the railways, and the system of posts and telegraphs and telephones, have all destroyed the separate boundaries between the States and have transformed the United States into one integrated country, industrially, commercially and politically. There are also a national press and national political parties with emphasis primarily on national issues and national interests. All these have naturally produced common ideas and attitudes, beliefs and values among the people in all parts of the country, making them into a nation with a developed sense of national unity and identity.

All these, however, should not be taken to mean that the States have lost their basic autonomy. Despite the strength of the present trend towards centralisation, the powers and authority of the States as granted by the

Constitution remain intact and as jealously sought to be maintained as ever. Indeed, centralisation of American federalism has taken place...far less by the withdrawal of the State and local governments from fields of activity than by the entrance of the national government into fields previously almost exclusively dealt with by the other governments, if dealt with by governments at all.

To conclude, "Centralising tendencies have been important in almost every democratic society in this century. ...what is happening in America is happening nearly everywhere ; strands of functional union are crossing lines of geographical subdivisions in increasing numbers, knitting national societies closer together."

"In every society the pattern is different, and even within a society the development is rarely uniform. Knots of resistance arrest and modify the centralising tendencies, and a confused pattern emerges. In America, the party system and sectionalism, especially that of the South, provide the most effective political resistance to national centralisation ; and the States, which are constitutionally protected from destruction or remodelling, provide its focal points....Anything like complete political and constitutional consolidation in America seems impossible."

**Q.** *In the U. S. A. the principle of judicial review is a policy making power in the hands of the judges."*

**Ans.** The most distinctive feature of the American federal judiciary is its power of judicial review. It means the power to determine whether a law of the Congress or any provision in a State Constitution or any law by

any State legislature or any other public regulation having the force of law, is consistent with the Constitution of the U. S. A. The Courts and ultimately the Supreme Court decide this question in course of their actual business of deciding cases which come before them. The Courts will examine whether a law, on the validity of which the particular case may turn, is in conformity with the Constitution. If it is not in the opinion of the Court, it refuses to give effect to it which thus becomes nullified because thereafter neither the Supreme Court nor any other Court will recognise it as law and enforce it.

This power of judicial review is enjoyed by all federal Courts but their judgments can be appealed against and reversed in the Supreme Court which thus has the final authority of deciding the constitutionality of any law. In the States, the highest Court in each enjoys such an authority in relation to the laws made by the State legislatures.

This power of judicial review over an act of Congress was first asserted by the Supreme Court in the famous case of *Marbury vs Madison*. For assumption of such a power by the Court, there is no constitutional sanction of an explicit nature. Therefore, the action of the Court became and ever since remained highly controversial. But the Supreme Court's power of judicial review, whether right or wrong, is now a fact and is recognised as such by all concerned.

The idea of judicial review is attacked chiefly on two counts. In the first place, it is said that to allow the Supreme Court to declare a law passed by the national

legislature null and void is tantamount to making it a third chamber sitting in judgment of what the nation's freely chosen representatives do. And, secondly, what that judges decide are not simply legal issues but also legal issues suffused with social and economic questions. And here, however independent and impartial court may formally be, the predilections of the judges cannot but come into play to colour their judgments. It may be said that such a system often clogs the wheels of progress and prevents the valid enactment of economic and social reforms. Further when the judgment of the Court is by a majority of 5 to 4, it really amounts to allowing one man a veto over the nation's social and economic philosophy.

Thus that the Courts interpret instead of making law is a fiction, that "their legal supremacy inevitably makes them policy determining organs, and as such subject to political pressures", can be shown by "an account of the practical relations between the Supreme Court and the elective branches of the national Government."

"The Supreme Court has not often set aside the judgment of Congress. It has invalidated the provisions of national law in about eighty cases. In most of these cases, only part of a statute, often a minor part, has been declared void. Only eight or ten statutes have been held unconstitutional in their entirety. Since 1789 Congress has passed over 70,000 acts, of which over 30,000 have been public acts. Statistically the incidence of judicial review on Congressional legislation has been extremely slight."

To strike down an act of Congress is always a serious

matter having not only the positive consequence of making the particular law void but also negative consequence of discouraging legislation of a particular type. For example, "when the Supreme Court declared a national income tax law void in 1895, it prevented the use for nearly two decades what has proved to be the most important fiscal instrument of the national government." "After the Civil War the court exercised its power to invalidate legislation much more than before. In the mid 1930's it pushed its power to the breaking point. In seventeen months it held void all or part of eleven major national acts dealing with the problems of the depression." This led to the famous Roosevelt plan to pack the Court. The plan was defeated but the bitter struggle on and around it ultimately led to a change in the Court's viewpoint. "The President lost the battle but won the war." Since then social and regulatory legislation has been regularly sustained, "only three major provisions of national acts have been held void since 1937."

One or two important lessons may be drawn from this account. First, Roosevelt's failure clearly shows that "a direct challenge to the independence of the Supreme Court is politically dangerous." Second, "it is part of the art of judicial statesmanship not to obstruct the elected branches of the government too much." Thirdly, the Court must take due note of the prevailing sentiment among the predominant majority of the people. When the Supreme Court struck down liberal social legislation in the late nineteenth and early twentieth centuries, it did so at a time when the country

was sharply divided on its merits and many members of the political branches were glad to be able to support liberal measures in principle while pointing out that the Constitution did not permit them. But when the Court struck down liberal legislation in the 1930's, it did so at a time when the electorate had endorsed the new deal by large majorities and most members of the other branches of the government believed firmly in the necessity for at least some of the legislation. In this context, the Court had in fact much less scope in reviewing legislation."

Thus, though there is much force in the argument that the Supreme Court can only interpret what is already there and cannot amend, yet there does not seem an escape from the position that judicial review really gives a policy making power in the hands of the judges. Now if that is accepted, the question becomes how to ensure that the Court though inherently a check on the elected branches of the government does not consistently oppose the general direction of government action. In other words, it becomes a question of making the judicial decisions responsive to public opinion. While amendment of the Constitution is ultimately there, it is "too cumbersome to use often," unless the whole principle is to be abolished or certain matters to be taken wholly out of its jurisdiction. A more practical method may lie in "presidential screening of nominees to the Supreme Court according to their views on major public policies." But "the best is to develop a tradition of judicial self-restraint." And in practice at present this is what seems to be developing, "Except



when dealing with civil liberty and civil rights cases, most of the justices have appeared to accept the need for self-restraint in judging the constitutionality of legislation."

To conclude, "When the task before the Supreme Court is considered, and the history of its work is reviewed, it is not difficult to endorse the words which Alexis de Tocqueville used in his *Democracy in America* in 1835: 'The Federal judges must not only be good citizens, and men possessed of that information and integrity which are indispensable to magistrates, but they must be statesmen-politicians, not unread in the signs of the times, not afraid to brave the obstacles which can be subdued, nor slow to turn aside such encroaching elements which may threaten the supremacy of the Union and the obedience which is due to the laws.'"

**Q.** "*The Supreme Court in the U. S. A. is the sheet anchor of the Constitutional system of the country.*" *Elucidate.*

**Ans.** The Supreme Court of the U. S. A. is really the possessor of such power and prestige as has no parallel in other countries. This Court is at the top of the federal judicial system. The Constitution established the Supreme Court and left the establishment of other federal Courts to the Congress. At present the Court has one Chief Justice and eight associate judges.

All the judges of the Supreme Court are appointed by the President with the consent of the Senate to hold office during good behaviour and cannot be removed except by impeachment. The Court has its own officials and establishes its own rules of procedure.

Cases may come before it in two ways, by original suit or by appeal. The original jurisdiction of the Supreme Court is limited by the Constitution to cases involving ambassadors and other public ministers and cases in which a State is one of the parties, and the other party is the United States, a foreign State or another State of the Union.

But far greater is the Supreme Court's appellate jurisdiction. The appeals come to it against the decisions of the subordinate federal Courts and the highest State Courts. The popular idea, however, that an appeal to the Supreme Court is a matter of right is not correct. Appeals to it lie only in cases where the highest State Court has held valid some law which is alleged to be in violation of the federal Constitution or of a law made by the Congress, or of a treaty made by the United States, or has held invalid a federal law or treaty.

The Supreme Court has no advisory jurisdiction and whatever comes to it comes as a result of an actual controversy. But the real position of the Supreme Court is not revealed in these matters. The position by virtue of which it is said to have become the sheet anchor of the constitutional system is revealed in its power of what comes to be known as the principle of judicial review. So an examination of this principle of judicial review is necessary for an understanding of the constitutional role of the Supreme Court.

The principle of judicial review means the power to determine whether a law of the Congress or any provision in a State Constitution, or any law made by any State legislature or any other public regulation

having the force of law, is consistent with the Constitution of the United States. The Court decides this question in course of its actual business of deciding cases which come before it. In deciding cases, it examines whether a particular law upon the validity of which the case may turn is in conformity with the Constitution. If in the opinion of the Court it is not, it refuses to give effect to it which thus becomes nullified.

This power of judicial review is enjoyed by all federal Courts but their judgments can be appealed against and reversed in the Supreme Court which thus has the final authority of deciding the constitutionality of any law. In the States, the highest Court in each enjoys such a power in relation to the laws made by the State legislatures.

This power of judicial review over an act of Congress was first asserted by the Supreme Court in the famous case of *Marbury vs Madison*. For assumption of such a power by the Court there is no explicit constitutional sanction, but it may be shown to be necessary in the following manner.

The Constitution establishes a federal system in which the dominant feature is a separation of domain between the Union and the Units both of which are given and are expected to remain within, a constitutionally defined limit. Thus logically such an arrangement entails the presence of an authority to see to the maintenance of the system established by the Constitution. And such a power cannot be given to Union legislature or to the Union executive or the Units for any such thing will tend to upset the federal system. Thus

an independent authority in the shape of a Supreme Court becomes the best possible choice. Again, the Constitution being a written one and regarded as the supreme law of the country, there should be some agency for its authoritative interpretation, for, any document needs interpretation. Finally, the Constitution grants some fundamental rights to the citizens, the task of protection of which inevitably goes to the Supreme Court, an independent authority free from the influence of the executive and the legislature. Considering all these, judicial review seems to be sound in principle and necessary without which the constitutional system could never have gained the strength and regularity of operation which it possesses to-day.

Again, we know the Constitution of the U. S. A. in its political philosophy is a typical product of eighteenth century individualistic liberalism. But through various forces that Constitution has always been kept on the move at pace with changes of needs, conditions, ideas and outlook. And of all the forces here the most important certainly has been judicial interpretation. A weak federal government has to-day been transformed into a strong national government and judicial interpretation has provided the essential basis of this momentous change. How powerful an instrument this has been in the development of the Constitution, is illustrated by the following: "that isn't a correct interpretation of the Constitution," remarked a Supreme Court Justice to a young lawyer arguing a case. "Well, it was—until your Honour spoke," came the reply. In a very real sense the Constitution is what the Supreme Court says it is.

Further, the immensity of the power enjoyed and exercised by the Supreme Court is also seen in its role as protector of the rights of the people. Here the main instrument wielded by the Court is what come to be known as the "due process of law". The notion of the due process of law has enabled the Court to insist not only that any interference with the rights of the people are to be justified in terms of law made under the direct authority of the Constitution but also examine whether any such law interfering with popular rights should be there.

Thus in maintaining the supremacy of the Constitution, the constitutional division of power between the Union and the Units, the rights given to the people, etc. as well as in enabling the Constitution to keep pace with the march of time, the role of the Supreme Court has been of crucial importance. And thus it is no wonder that despite some controversy over the propriety of the power of judicial review enjoyed by the Supreme Court, there is a general tendency of acceptance of the role of the Court particularly in view of the fact that the alternative is to give more power which may well be the first step in the abolition of many of the distinctive features of the Constitution.

*Discuss the distinctive features of the Soviet judicial system.*

**Ans.** All Courts in the Soviet Union are based on the elective principle. The Supreme Court of the U. S. S. R., the only formal Court in the Soviet Union which is national in character, is elected by the Supreme Soviet

for a term of five years. The other Courts below the Supreme Court of the U. S. S. R. are the Supreme Courts of the Union Republics, Autonomous Republics, Autonomous Regions, etc. elected by their respective Supreme Soviets for a term of five years. The lowest Courts, called People's Courts are directly elected by the voters of the districts for a term of three years. In addition to these there are special Courts appointed by the Supreme Soviet.

The Supreme Courts of the U. S. S. R. is "based on the Judiciary Act of 1938 and amendments added in 1957." The Supreme Court is headed by a plenum consisting of its president, a deputy president, the presidents of the sections and the presidents of the supreme courts of the constituent republics—the last not being members of the Court. The Court is divided into several divisions, each specialising in certain types of cases. "Prior to 1957 there were five of these colleges: criminal, civil, military, water transport and rail-road transport. Under the reorganisation effected in 1957 the rail-road and water transport sections were dropped."

The Supreme Court is a large body compared with its counterparts in most countries, its membership before 1957 being somewhere around the seventies. But the reorganisation of 1957 made a drastic reduction in the number limiting it to 'a president, 2 deputy presidents, and 9 ordinary judges. Its main functions are to supervise the work of the Courts of the Union and the Units, and to hear appeal from all lower Courts. "Prior to 1957, the Supreme Court had both appellate and original jurisdiction. Under the provisions of the

1957 act, it lost its original jurisdiction over cases of high treason and other major criminal offences. It continues to hear disputes involving the republics, but otherwise all cases must first be heard by local, regional, and Supreme Courts of the republics before being brought on appeal to the Supreme Court. Emphasis under the new act is placed on drastically cutting the number of cases to be heard by the Supreme Court and concentrating on matters of outstanding legal significance. The Supreme Court interprets intricate laws or sections of laws and reviews the acts of administrative authorities of the constituent republics." But it cannot, unlike the U. S. Supreme Court and like the Swiss Federal Tribunal, declare any law unconstitutional and does not have the power of interpreting the Constitution. The judges usually are professional lawyers but sit with lay assessors to help them. This is due to the adherence to the principle that Courts must take into account the social and economic background of disputes and crimes.

The Supreme Soviet may establish special Courts for various special purposes such as the trial of important political offenders, and other equally important special cases. The task of instituting public prosecution is with the Procurator-General of the U. S. S. R. appointed by the Supreme Soviet for a term of seven years. He again appoints Procurators of each Union Republic and of their large sub-divisions. It is the business of the Procurator-General to ensure strict observance of the law by everyone—private citizens, officials and ministers.

The quality of Soviet justice varies enormously. In

civil and ordinary cases it is fair and competent though may be a little rough and ready. The Constitution insists on public trial conducted in the language of the area and provides to the accused proper defence facilities. Soviet Courts also exhibit a real interest in the reformative treatment of criminals. But treatment of persons accused of offences against State is really severe and ruthless inasmuch as the system makes criminal any attempt even by the most peaceful means to criticise or mobilise opinion against the declared policy of the State which is the policy of the Party really.

To conclude, the judicial system of the Soviet Union is seen to be characterised by three things. In the first place, the political character of the Courts and of the justice they administer is openly acknowledged. "The Soviet Court is an organ of State that administers justice on the basis of the laws of our Soviet Socialist State." Secondly, it is organised on such lines and such principles as to establish and maintain a continuing connection with the masses of the people. And, finally, methods and procedures have been made simple and easily intelligible by the ordinary people with the idea of making justice cheap, fair and near to the people.

But a few points of criticism may also be made. First, "It is not entirely accurate to say that the Soviet lay judges represent the general public. While very few of them are members of the Communist Party, they are selected by institutions in each district, such as factories, farms, universities, retail stores and army units. In consequence, the panels from which lay judges are called for service are not cross-sections of the entire population



as are the panels from which jurors are selected in the United States."

Secondly, the Soviet Constitution gives to the people most of the procedural guarantees of justice but subsequent law makes numerous exceptions in which these guarantees may be and have actually been withdrawn.

Thirdly, another element of vital importance, the element that has come to be known as the presumption of innocence is also missing from the Soviet code. Soviet law contains no written statement of presumption of innocence.

Finally, perhaps the most important point of criticism is that the Courts do not enjoy any real independence. "While lower Courts are insulated by law from interference by local party tyrants, the Supreme Court is always subject to control by the highest policy-body in the State apparatus, the Supreme Soviet, in which nearly 80 percent of the deputies are members of the Communist Party and, therefore, subject to strict political discipline. The Courts do much to protect the citizens from mistaken application of State policy, and in so doing win the respect of many citizens for the fairness of the regime in matters affecting the employment relationship, family quarrels, and housing disputes but they cannot be a bulwark against tyranny if the leaders of the Party decide that some tyrannical measure is necessary in the interest of security."

*Q. Discuss the features of the Supreme Soviet of the U. S. S. R. What role does it play in the government system of the Soviet Union ?*

**Ans.** The Supreme Soviet consists of two Houses, the Soviet of the Union and the Soviet of Nationalities, both elected, at the same time for a four-year term, by the direct vote of the people. The Soviet of the Union numbers about 750 members elected by single member territorial constituencies each containing some 300,000 inhabitants. The Soviet of Nationalities is made up of twenty five members from each Union Republic, eleven from each Autonomous Republic, five from each Autonomous Region and one from each National Area, the total being about 630. Sitzings of the two Houses begin and end simultaneously, they are held twice a year and last about a fortnight. At the first meeting after an election the two Houses sitting jointly elect an executive committee, called the Presidium, consisting of a President, fifteen vice-Presidents, a Secretary and fifteen other members. The President is, for formal purposes, the head of the State but as in Switzerland, the entire Presidium may be regarded as a collective Head of State. The two chambers of the Supreme Soviet have equal power. Laws are made by a simple majority of the two chambers and a two-thirds majority is required for amendment of the Constitution. In case of disagreement between two chambers, the Constitution has provided for a conciliation committee with equal representation of both Houses and finally the Presidium can dissolve and call for new elections. Besides its regular sessions, special session may be held if called by a Union Republic or by the Presidium. Its most important functions are :

1. To elect in a joint session, the Council of Ministers,

the Presidium, the Supreme Court, Special Courts and the Procurator-General.

2. To criticise and supervise the administration. The scope and nature of criticism, however, are different from those in countries of the West. There is no recognised opposition and the members not belonging to the Party are not allowed to meet as a group or to take a common stand. So criticism, if any, must come and actually comes, whatever it is, from within the Party itself.

3. Finally, its most important function relates to legislation. The Constitution vests the entire legislative power of the federation with the Supreme Soviet which is entitled to its exclusive use. But like all other modern legislatures, it is also overburdened and the more so because it meets only for a few days twice a year which is in any case a much too short period. This is emphasised all the more when we remember that because of the total planning characteristic of the regime, it has to look after a really awful lot of tasks.

If in the Soviet structure there is to be found anything resembling, in power and functions, a usual Parliament, we are to look at the Presidium rather than at the Supreme Soviet. The latter may indeed be looked upon as a delegate conference electing a body which is both a legislature and a supervisory body over the executive. Delegates to the Supreme Soviet are not full time politicians and keep on doing their ordinary businesses and maintaining their touch with the people. As delegates, they may be recalled and replaced, in theory by the constituents but actually according to

the decisions of the Party. The membership of the Supreme Soviet consisting of people of both sexes, many nationalities and many different occupations shows a predominant proportion of managerial and professional men.

Generally the Supreme Soviet does its work with unanimity and to understand this, we must look at the conduct of elections. Any citizen of eighteen and above has the vote and any citizen of twenty three and above may stand as a candidate for the Supreme Soviet. In each area, there are Commissions composed of representatives of organisations which are officially permitted to exist. The task of the Commission begins with the preparation of an accurate electoral roll of citizens and to provide them with voting facilities on the election day. Candidates are usually set up by the organisations represented in the Commission which examines the qualifications and suitability of the candidates. Then through debate in the Commission and even public discussion, a most suitable candidate for each electoral district is found and his name appears on the ballot paper. The voter now has four alternatives before him—to vote for the candidate, to vote against him by striking his name off the paper, to invalidate the ballot paper by putting other kinds of mark on it, and to stay at home and not vote.

Thus the real election is done by the organisations represented in the Commission, the most important of them being naturally the Party and party members being the most active on other organisations also. There may be some non-party candidates but there certainly

cannot be any anti-party candidates. There is thus no real choice of policies in this process and according to some it is only a false show of democracy. But these elections may be said to accomplish three things ; first, they indicate in a cautious manner the mood of the people, acquiescent or resentful ; secondly, though there is no choice of policies, there is some choice of persons and it is not unimportant that policies are implemented by more competent persons rather than the less ; and thirdly, elections are a process in which and through which the citizens can and are made to, identify themselves with the government.

But in view of the fact that in the Soviet Union there is a wide divergence between what a reading of the Constitution will indicate and what actually happens, the latter being wholly determined by the will of the top leadership of the Party ; it is rather difficult to assess the actual role of the Supreme Soviet in the government of the Soviet Union. Clearly its role is far inferior to that of either the Parliament of Britain or the Congress in the U. S. A. But that should not be taken to mean that it is completely without any importance of its own. "With sessions covering only a few days twice a year—a total of perhaps two or three weeks out of every year—it is apparent that the Supreme Soviet does not spend the time on the introduction of bills, committee consideration, debate, amendments, and the like that is familiar in Britain, the United States, and elsewhere." But nevertheless, there is in the Supreme Soviet, a committee, there is debate which occasionally at least, becomes lively, there is criticism of the government which, again,

occasionally at least, becomes severe. Also "in a country as large and complex as the Soviet Union there are numerous matters which, because of their non-political character or routine importance, do not greatly concern the party-leaders. It is in this area that the role of the Supreme Council becomes more impressive."

"To sum up, it seems justifiable to conclude that the Parliament of the Soviet Union—the Supreme Council or Soviet—is not a deliberative body in the Western sense. It is more of a sounding board, an audience for the announcing of new programmes, important decisions and the like. While it frequently serves as a rubber-stamp in giving formal approval to decisions already taken, it cannot be denied that it exercises a reasonable amount of influence in the routine affairs of the Soviet Union."

*Q. Discuss the constitution and functions of the Presidium of the Supreme Soviet of the U. S. S. R. Why has it been described as the collective President of the U. S. S. R. ? What is its actual role ?*

**Ans.** The Presidium of the Supreme Soviet of the U. S. S. R. consists of President, 15 vice-Presidents, a secretary and 15 members all of whom are elected at a joint session of the two chambers of the Supreme Soviet. Its functions include :

To convene the sessions of the Supreme Soviet ; to issue decrees which have the force of law ; to interpret the laws of the State ; if necessary, to dissolve the Supreme Soviet and order fresh election ; to conduct nation-wide referendum on its own initiative or on the demand of the Union Republic ; to annul decisions and

orders of both Union and State ministers, if against law in its opinion ; in the intervals between the sessions of the Supreme Soviet, to appoint and dismiss ministers, subject to later confirmation by the Supreme Soviet ; to award titles ; to exercise the right of pardon ; to appoint and remove officers of the military high command ; when the Supreme Soviet is not in session, to declare emergency and war ; to order mobilisation, if necessary ; to ratify or reject international treaties ; to appoint and remove ambassadors to foreign States.

The Presidium is a unique feature of the Soviet Constitution, combining in itself legislative, administrative and even judicial functions. The legislative functions include issuing of decrees having the force of laws, appointing and dismissing ministers subject to later confirmation by the Supreme Soviet, declaring emergency and war and ratification of treaties. The executive functions are convening the sessions of the Supreme Soviet, exercising the right to pardon, awarding titles and honours, ordering full and partial mobilisation, appointing ambassadors, officers in the armed forces, etc., dissolving the Supreme Soviet, and ordering new election, conducting nation-wide referendum, etc. And the judicial functions are interpreting the Constitution, annulling Union or State laws on grounds of their being against the Constitution, etc.

Thus, the Presidium has justly been characterised as at once a continuing substitute for the Supreme Soviet, a higher level executive than the Council of Ministers, and a supervisor of ministerial everyday activities employing the disciplinary and corrective power

that accompanies the power to quash decisions and orders and to oust ministers.

In short, it will not be untrue to say that "though theoretically the sole legislating organ in the Soviet pyramid, the Supreme Soviet like its predecessors -- large in composition and meeting for a brief period in the course of the year—has so far operated primarily as a ratifying and propagating body", and in practice, its functions as well as some others usually done elsewhere by the ministry and the courts are all in the hands of the Presidium which thus becomes the effective wielder of power and the real ruler of the entire complicated Soviet system of government.

Thus the Presidium of the Supreme Soviet of the U. S. S. R. by virtue of the powers at its disposal is the "highest permanently functioning organ of State power of the Soviet Union." In other countries there are no organs of power like the Presidium of the Supreme Soviet of the U. S. S. R. There a single person heads the State. Though the President of the Presidium is regarded as the equivalent of the formal Head of the State, yet in reality "the Soviet Union is headed not by a single person but by a collegium consisting of 33 members of the Supreme Soviet of the U. S. S. R. who, to use Stalin's expression, constitute the collegial President of the of the U.S.S.R."

Now as regards its actual role, it is rather difficult to say anything with definite conviction. But in view of the fact that the theory and practice of the Soviet Constitution differ widely and the really effective role in every matter is played by the Party which is not only a State within the State but rather real State behind the



facade of the formal State, the following point may be made. "Most matters of any importance are canvassed by the Presidium of the Communist Party, and this body lays down policies or makes major decisions. It remains for the Presidium of the Supreme Council to follow these policies and carry out these decisions. Consequently, it is impossible for the Presidium to exercise any real authority in foreign relations, national defence or domestic problems of major character. The fact that the members of the Presidium are active in the Party makes the strain less than it might appear to be. Nevertheless, with the tradition of having the Party rather than the agencies of government decide far-reaching policies, it will be extremely difficult to infuse much real vigour into the Presidium. On the other hand, one must not lose sight of the tremendous amount of routine work involved in government, particularly in a police State, and which in the Soviet Union is handled to an important degree by the Presidium of the Supreme Council."

**32.Q.** *"There are two methods of amending the Constitution of Switzerland, an explicit method and an implicit method." Explain.*

**Ans.** Generally constitutions are classified as rigid and flexible and federal constitutions are usually made rigid by the provision of a special procedure for amendment. This is considered by some to be an essential feature of a federal constitution. But the rigidity of a constitution is clearly a matter of degree. Also, however rigid, a constitution must somehow keep pace with the

changes in the life conditions of the people which are inevitable. When such a necessary development becomes too difficult to accomplish through the prescribed procedure for amendment, naturally some other method develops. We may describe the first as the explicit and the second the implicit method. The existence of these two methods can be seen best in the Constitution of the Switzerland. Let us now explain the method of amendment as provided in the Swiss Constitution.

Amendments to the Constitution may be of two kinds, total and partial. A proposal for total amendment may be raised in the federal legislature or may be raised through the popular initiative of 50,000 or more citizens. If there is a difference of opinion between the two Houses of federal legislature regarding the necessity of the proposed amendment or if the proposal comes from popular initiative, the question whether the Constitution will be amended is decided by a referendum of the people. If the referendum decides in favour of the amendment, then, for this purpose a new election to the federal legislature is arranged. And after the proposed amendment has been accepted by the legislature, it has again to be ratified by the people through a referendum as well as by a majority of the cantons.

As regards partial amendment, the federal legislature through the ordinary process of legislation may accept a proposal but it has then to be ratified by a majority of the citizens as well as by a majority of the cantons. Also, a proposal for partial amendment may come through popular initiative, the minimum number of people participating in such a venture being 50,000. A proposal

coming in this way is submitted to the legislature. But if the legislature does not agree with need for the proposed amendment, the proposal is submitted to and decided by a referendum. If the verdict of the referendum is favourable then the legislature has to take the appropriate steps which, however, must be ratified by a majority of the people and a majority of the cantons.

Thus the most important point to bear in mind is that an amendment, however, originating, does not become effective until and unless it has been ratified by a majority of the citizens as well as by a majority of the cantons. It is found that during the period from 1848 to the present the total number of amendments accepted has been 49 and this shows the rigidity of the Constitution.

But apart from this explicit method, "there is also a method of amendment by implication." The general legislature may pass a law which conflicts with the Constitution. That law may not be questioned at all and in that case it comes into full effect and the Constitution is to that extent amended. Or it may be submitted to a referendum of the people on the request of 30,000 electors or of 8 cantons. In this case all it requires in order to be approved and to come into full effect is a simple majority of all the electors voting. There is no requirement here that a majority of cantons also is needed. This is apparently an easier method of altering the Constitution. At the same time it may be asserted at once that it could be used to make small modifications only in the Constitution. Any open and obvious amendment to the Constitution would require in normal

times in Switzerland the invocation of the ordinary method of constitutional amendment.

But the fact that small and imperceptible but necessary changes in the Constitution may be brought about without resort to the rigid prescribed procedure has the advantage that quick adjustments become possible at least in some cases. This, however, should not be taken to mean that the rigidity of the Constitution is reduced. It is to be noted that this method has been used with moderation. Thus neither the supremacy of the Constitution nor its rigidity is in question though it may be said that the Constitution is "left open at every point to an absolute democratic check by the instruments of the referendum and the popular initiative."

*Q. Discuss the peculiar features of the Government of the Swiss Republic.*

*Ans.* In considering the peculiar features of the government of the Swiss Republic, the best starting point for us is the saying of Bryce characterising it as "a system of government which falls in a class by itself, which differs fundamentally from the Presidential and the Cabinet types, but which combines certain features of both."

In Switzerland the executive power of the federation is in the Federal Council composed of seven members, elected for four years, by two Houses of the Federal Legislature sitting jointly. Anyone who is eligible for membership of the National Council may be chosen but Federal Councillors may not be members of either house of the legislature nor may they undertake any other

work besides their governmental duties. Each of the seven members comes from a different canton and in practice, a Council is elected in which the main political parties, the Catholic and Protestant Communities and main language groups in the population are represented. Although there is no constitutional bar to Councillors being outsiders, yet usually only members of the Federal Assembly are elected. Again, re-election is frequent and it often happens that the same man continues to look after the same department from his first election to the time of his death or retirement. Although elected by the legislature, the Swiss executive, however, cannot be dismissed by the legislature nor the legislature can be dissolved by the executive. The Councillors can speak in both Houses of the legislature but cannot vote.

One of the members of the Federal Council is elected President of this body at a joint sitting of the legislature. This President of the Federal Council also serves as the President of the confederation. He is the formal Head of the State, presides over the meetings of the Federal Council. This is a yearly office, going round in rotation, no one being eligible to hold it for two consecutive terms.

The main functions of the Federal Council are to execute the laws and decrees of the federation, to submit drafts of the same to the federal legislature, to report upon proposals submitted to it by the two Houses of the federal legislature and the cantons, to look after the security, internal and external, of the Constitution, and to administer the finances of the federation. At each ordinary session of the legislature, the Council is

required to give a report on administrative matters and at that time it may make suggestions for new measures. In the lower house, the National Council, the Councilors are also put to some oral or written questions.

The Constitution contains no provision authorising the conferment of any special power on the executive. But the duty of preserving the independence and neutrality of the country is entrusted to the executive which has also in its hands the control of the armed forces. It is seen that at times of need, it has been possible for the executive to stretch its powers widely, in fact, amounting to almost unlimited military and economic powers subject only to periodic reporting to the legislature.

The Executive is similar to the cabinet system in so far as the Federal Council is a Committee of the legislature chosen by it to exercise the executive functions of the government, in so far as each of the seven Councillors heads one administrative department, in so far as each Councillor may participate in the proceedings of either house of the legislature, may make proposals, may be questioned on administrative actions and policies, are subject to the control of the legislature or more precisely, of the lower house and usually will yield when the legislature makes an issue on any question. Again, the Council's functions of formulating and drafting all important bills, including the budget, introducing them in the legislature and recommending their enactment, also make it resemble a cabinet. Though theoretically it is a creature and servant of the legislature, yet in practice, not unlike the British Cabinet, it plays the role of leader and guide. But at the same time there

are important points making it different from the Cabinet in a Parliamentary system of government. These are that it has no political homogeneity because it does not necessarily represent the majority political party or a bloc of parties in either chamber of the legislature ; members of the Council are not at the time of their election committed to any political programme ; questions in the legislature are not followed by votes of approbation or censure ; and most important, of all, loss of confidence of the legislature or rejection by the legislature of any proposal of the Council does not oblige it to resign, thus making absent the perhaps most important feature of cabinet government, namely, responsibility of the executive to the legislature and the remaining in power of the executive during the confidence of the legislature.

Thus the chief features of the Swiss executive making it a unique institution are, first, that it is a collegial executive in the true sense of the term, there being no *primus inter pares* ; second, that it is not based on any party following, the members of the Federal Council being elected on the strength of their personal integrity, efficiency, etc. ; and third, that it is a combination of both the parliamentary and the presidential systems, or rather more correctly, of certain features of the two systems. The Swiss executive's fixed term, its election by the elected representatives of the people, its not being responsible to the legislature, its immunity from being dismissed by the legislature, its inability to dissolve the legislature, etc. are some of the features that make it somewhat similar to a presidential type of executive.

Again, its differences from such a system are also only too apparent to need any detailed elaboration, these lying in all the features that make it some what like a cabinet.

And the advantages of the Swiss system are many. First, in a very real sense, the government can eschew party considerations and spread its view over the entire field of national interest. This is because the government is in no way dependent on votes cast from party points of view. Secondly, because the Councillors for being elected are to exhibit as qualifications, not their affiliation to this or that party, but energy, integrity, efficiency, etc. there is no reason why they should not continue to be re-elected again and again, at least so long as they want to serve. It has the sure advantage that in course of their long tenure they come to acquire a rich fund of experience which they have every opportunity to use in the service of the nation. Thirdly, long tenure also makes for continuity in policy and administration and contributes to the establishment and growth of healthy traditions the value of which can hardly be over emphasised. Fourthly, because the life of the executive is in no way dependent on the vote of the legislature, it is possible for the executive to act really independently without fear or favour and recommend measures to the latter which it honestly thinks to be the best interest of the nation.

Finally, it must be remembered that with its advantages, the system of collegial executive is not entirely unattended with difficulties. But the system has been a success in Switzerland mainly on account of certain



habits and traditions of the Swiss people and because the ground had already been prepared through local experience, the institution, through its working in the cantons, having passed the experimental stage when it was introduced into the national level in 1848.

*Q. "A movement is now making itself felt by which the Swiss Federal Council will become a government rather than an administrative body." Elucidate.*

**Ans.** In Switzerland the executive power of the federation is vested in the Federal Council composed of 7 members elected for 4 years by a joint sitting of the two Houses of the federal legislature. Though elected by the legislature, the Swiss executive cannot be dismissed by the legislature and the executive also does not have the power to dissolve the legislature. The members of the executive can speak in both houses of the legislature but cannot vote.

It has been said that a system of government which falls in a class by itself, which differs fundamentally from the presidential and the cabinet types, but which combines certain features of both, is that of Switzerland. It is similar to the cabinet system in so far as the Federal Council is a committee of the legislature chosen by it to exercise the executive functions of the government, in so far as each of the seven Councillors heads one administrative department, in so far as each Councillor may participate in either house of the legislature, may make proposals, may be questioned on administrative actions and policies, are subject to the control of the lower house of the legislature and will usually yield

when the legislature makes an issue on any question. Again, the Councillors' functions of formulating and drafting all important bills, including the budget, introducing them in the legislature and recommending their enactment, also make them resemble a cabinet.

But it shows important differences from the cabinet system in that it has no political homogeneity because it does not necessarily represent the majority political party or a bloc of parties in either chamber, members of the Council are not at the time of their election committed to any political programme ; questions in the legislature are not followed by votes of approbation or censure ; and most important of all, loss of confidence of the legislature or rejection by the legislature of any proposal of the Council does not oblige it to resign thus making absent the most characteristic feature of cabinet government, namely, the executive is responsible to the legislature and remains in office during its confidence.

Thus the chief features of the Swiss executive making it a unique institution are, first, that it is a collegial executive in the true sense of the term, there being no *primus inter pares* ; second, that it is not based on any party following, the members of the Council being elected on the strength of their personal integrity, efficiency, etc. ; and third, that it is a combination of certain features of both the presidential and the cabinet types of government. In short, it is not really a government but an administrative body, a creature and servant of the legislature and its business is to put in practice the will of the legislature.

But an outstanding modern development the world

over has been the growth of centralisation and a concomitant growth in the power of the executive branch of government. Indeed, the latter may be looked upon as a part and parcel of the former. And as regards the forces that have contributed to the growth of centralisation and increased power in the hands of the executive, they have been identified by Prof. Wheare as war, economic depression, demand for everincreasing social services and the mechanical revolution in transport and technological revolution in industry. These forces have operated as much in Switzerland as in other countries and everywhere with the same result. This change in Switzerland can be shown with reference to the change in the position of the Federal Council in relation to the legislature in practice rather than in theory.

In theory, the federal legislature of Switzerland is authorised by the Constitution to exercise the supreme authority of the Confederation subject only to the rights of the people and the cantons. This it does through its laws. But in law-making the Federal Council has a role which in theory is that of a servant but which in practice has gradually come to be that of leader and guide. "Not only it prepares the drafts of more than 95 per cent. of the bills, but all private bills, before their discussion in the Assembly, are referred to it for suggestions. Again, it issues a large number of regulations in execution of Federal laws. Such a power was delegated to it by the Swiss Parliament in a very large measure in the past, for examples, in 1914 and 1939, in the interest of security of the country and sometimes it went so far as to permit the Council to deviate from the Constitution."

“The normal process of law-making also shows the tremendous influence of the Federal Council over parliamentary legislation. When a law has to be passed, the Bill originates in the Federal Council or is taken up by it on the recommendation of the Federal Assembly. The Federal Council also acts on the suggestions of the members of Parliament when they are passed in the form of resolutions. It drafts the Bill with the help of its permanent officials or outside expert, and then submits it before the Federal Assembly where it is examined by a Parliamentary Committee. The Federal Councillor in charge of the Bill easily carries the day in such a committee whose inexperienced members always follow the advice of experienced and trusted administrators as these Councillors always are. The report on the Bill is drawn up with the help of Government experts and consequently, the Minister pilots it very easily through the Parliament.” Thus it is quite right that “one is forced to admit that the most responsible and influential work is that not of the so-called legislature but of the executive.”

This view of the increasing importance of the executive is strengthened by the ordinance-making power of the Federal Council. And what is more these ordinances promulgated by the Federal Council are not subject to legislative referendum.

In short, though the Constitution contains no provision authorising the conferment of any special power to the executive, yet the duty of preserving the independence and neutrality of the country is entrusted to the executive which also has in its hands the control of the armed forces. And it is seen that at times of need it has

been possible for the executive to stretch its power widely, in fact almost unlimited military and economic powers, subject only to periodic report to the legislature.

A few other factors may also be mentioned in connection with this phenomenon of the increased importance and prestige of the executive. The increased influence of the Federal Council may be explained as due so much to its official position as to its experience, good will, efficiency, integrity, etc. Also, introduction of proportional representation has turned the legislature into a battlefield of very many parties and this has caused a lowering of its prestige. The system of direct democracy was always there to expose any legislative pretention. All these, combined with increased pressure on the Federal government as against those of the cantons tend to magnify the role and status of the Federal Council.

*A State is known by the rights it maintains for its citizens.' Discuss this proposition with reference to the U. S. A. and the U. S. S. R.*

**Ans.** We know that the nature of a State is known by the rights it grants its citizens. And the distinctive mark, indeed the superiority of a democratic government over all other forms of government rests upon the kind and number of rights it enables its citizens to enjoy, in theory as well as in fact. And since the Constitution of the U. S. A. is by all standards a democratic one, it also must and in fact does include a system of rights.

Before we enumerate the rights of the American citizens, a few points are to be noted. The national Consti-

tution with all its amendments names a number of rights but that is not all and the Constitution says clearly that mentioning certain rights does not imply the denial or disparagement of others. Secondly, the citizens have certain rights under the State Constitutions also and there too the list is by no means exhaustive. Thus, thirdly, a complete enumeration of all the rights is to be had nowhere. It is also because, as the Supreme Court has said, rights must be fixed by a process of judicial inclusion and exclusion. Fourthly, many things which the average citizen claims as rights are not so at all. The right to vote, for example, is not a right guaranteed by the Constitution. The Constitution merely gives a negative guarantee that the suffrage shall not be denied to any one on grounds of race, colour, previous condition of servitude, or sex. But it may be denied on other grounds like lack of age, residence, literacy, or even property. Fifthly and finally, there is a fundamental difference between a constitutional right and a privilege conferred by law.

The rights of the American citizens are to be found in a number of limitations on the powers of the Congress some of which are in the original Constitution and some in the amendments, the first ten of which are commonly called the bill of rights. These rights include (i) the immunity against bills of attainder and *ex post facto* laws ; (ii) the writ of habeas corpus except when suspended in the interest of public safety ; (iii) freedom of worship, speech, press, peaceable assembly, petitioning the government for redress of grievances ; (iv) immunity from slavery and involuntary servitude ;

(v) the right to keep and bear arms ; (vi) equal protection of the laws ; (vii) immunity against the danger of being adjudged a traitor by the constitutional definition of treason ; (viii) due process of law, and (ix) the right to property subject to the provision that government may take over private property for public use with due process of law and just compensation.

All these rights may be divided into two broad categories, substantive and procedural. The first category relates to the fact and essence of freedom and the second relates to the methods by which freedom is protected. The first includes the rights like immunity from slavery and involuntary servitude, freedom of religion, freedom of speech and press, right of assembly and petition, right to keep and bear arms, equal protection of the laws, etc. And the second category includes the rights of immunity from bills of attainder and *ex post facto* laws, the right to regular judicial process, habeas corpus, jury trial, and perhaps most important of all, due process, etc. It may also be mentioned in this connection that the due process of law can be invoked in defence of both substantive and procedural rights, the safeguard in one case operating "as a restraint principally upon the executive and judicial branches of government" and in the other, "principally upon the legislative branch."

To sum up, the American system of civil rights is characterised by several important features which may be put as follows. In the first place, the government, federal or State, despite their broad powers and jurisdictions, are creatures of the people who have deliberately kept

certain areas beyond their competence and here arise the constitutional rights and liberties which are no more and no less than the result of express or implicit denial of competence to the government. Secondly, the constitutional rights as such afford protection only against public or governmental and not private actions. Thirdly, a consequence of the federal system has been that certain restrictions apply to the federal government only, certain to the State governments only and certain others to both. In the rights protected against interference by the State governments, there is scope for and there actually exist wide variations because some rights derive restrictions imposed in the national Constitution, others from those in the State Constitutions and others from the mere absence of any granted or implied authority on the part of any government to interfere with them. Fourthly, like the rest of the Constitution, the articles and clauses guaranteeing civil rights require interpretation. It is this which makes the whole thing fluid and flexible and thus makes a complete enumeration impossible. Fifthly, our times have seen a general tendency to nationalisation of the rights which means that the four fundamental freedoms of religion, speech, press and assembly have now been accepted as a single national system and protected by the national Constitution by judicial interpretation of the fourteenth amendment on national and State levels alike. And finally needless to say these rights are by no means absolute but relative and subject to various limitations in practice, the determination of the nature and extent of which, however, inevitably raises many difficult problems.



Now, turning to the Soviet Union, we find the Soviet Constitution contains a chapter listing fundamental rights and duties of the citizens. The fundamental rights mentioned in the Soviet Constitution contain some which are common for any democratic Constitution but there are also some which are unique such as the right to work, rest and leisure, and maintenance in old age and education.

The rights of citizens are stated and given a social basis. The Socialist organisation of society guarantees the right to work and payment according to quality and quantity. The Constitution in this regard follows what Marx called the socialist principle, to each according to his work and it may be mentioned in this connection that economic equality is not regarded as a right, at least in the present stage, in the Soviet Union whose economy is in fact characterised by very wide disparities of income. The right to rest and leisure is guaranteed by limiting working hours to eight, seven, six or four per day depending on the heaviness of the work and the provision of holiday centres. Maintenance in old age or in periods of unfitness for work is guaranteed by social insurance, free medical service and the provision of health resorts. Education is guaranteed by the provision of free compulsory schooling from the ages of 7 to 14 and a scholarship system thereafter, and by technical training in farms and factories. Again, it is important to note that education, to be conducted in the language of the student as required by the Constitution, is conducted in about seventy languages. Also, there is absolutely no difference between the sexes and practical

steps have been taken to make this equality of women with men real. The rights of women workers are secured by assuring equal pay for equal work, maternity leave on full pay, family allowances, day nurseries, etc.

The Constitution also guarantees equal rights to the members of all races and nationalities who are to be looked upon as equal in every respect. And, finally, there are the usual personal freedoms with appropriate guarantees. The Constitution secures freedom of conscience and of worship by separation of Church and State and allowing freedom of anti-religious propaganda. But pro-religion propaganda, it may be noted, is not allowed in view of the fact that the materialist philosophy of Marxism provides the basis of the whole life of the Soviet Union. The Constitution declares that the citizens' home and privacy are inviolable and that he may not be arrested save by order of a Court or with the sanction of a judicial officer. The right of asylum has been granted to foreigners prosecuted for defending the interests of the workers, for struggling for national freedom and for scientific activities.

Freedom of speech, publication, assembly, etc. are guaranteed by placing paper, printing press, the streets, etc. at the disposal of the working people and their organisations, which include those existing for trade union, co-operative, youth, sport, defence, cultural, technical-scientific activities, topped of course, by the Communist Party.

The Constitution also includes a list of duties of the citizens of which the most important are to abide

by the Constitution and to safeguard and fortify public socialist property.

A reading of the list of rights to be enjoyed by the Soviet citizens shows that the Constitution may on the strength of these claims to be democratic, at least as much as the Western States. But whatever the profession, the practice in the Soviet Union shows a difference and even in profession there is some difference. Some examples may be given to support this contention As regards the right to form organisations, it is clear that the Constitution does not definitely grant the freedom to form political organisations and the Communist Party has been officially granted a complete monopoly of power over all aspects of social life, political, economic, social, cultural, even scientific. Again, the provision for the workers' leisure is more in law than in fact, revolution, industrialisation, war and post war reconstruction all combining to make the government impose a heavy labour discipline. Further, freedom of speech is guaranteed, according to the Constitution, "in conformity with interests of the working people and in order to strengthen the socialist system ;" but it is evident that the interest of the working people means their interest as interpreted by a handful of people constituting the top leadership of the Party and there is in the State no power to challenge that interpretation. Finally, there is the fact that the Soviet Union is a one party State which is basically against the democratic idea of free exchange of ideas and this also cannot be left out of account in considering the real worth and extent of the rights enjoyed by the Soviet Citizens. //

To conclude, the rights and their practical guarantees found in the Soviet Constitution are also found in the Western democracies. Any comparison of course is difficult in view of the conflict of evidence it involves. But even then certain things seem to be clear. If the ruling group are selfless and efficient, there may be government for the people, there is never government of the people./ This principle of guardianship by a devoted vanguard over a people whose unfettered and untutored judgment cannot be trusted is not at all new ; in fact it is the same old principle which imperialist powers advance in justification of their Colonialism, and which has been frequently employed by white minorities dominating over the coloured majorities. A good case can be made out of it on two conditions first, that it can be clearly shown that the majority are so inferior to the minority in knowledge and capacity that left to themselves they would run into worse evils than being subject to an oligarchy ; and second, that the minority power are doing best to remedy this inferiority and enable the majority to take their rightful share of power and responsibility.”

Thus whatever the rights enumerated in the Constitution, the actual undeniable fact is that the rights of the Soviet citizens are determined by a small group of persons engaged in the task of building up of a State on a complicated, dogmatic and infallible ideology to which all must subscribe. To say, however, that the citizens' rights in the U. S. S. R. are very imperfectly safeguarded by no means implies that the corresponding position, in the U. S. A. is faultless./ Far from it,

as the fight of the Negroes shows, for example. And there are many other defects and drawbacks in the American life which make the solemn constitutional rights meaningless for millions in actual fact, if not in theory./ Nevertheless, the redeeming feature of the American system is that it is a democracy having a built-in self-correcting device which is conspicuous by its absence from an authoritarian and totalitarian system like that existing in the U. S. S. R./

# **CONSTITUTIONAL LAW**

**[ BRITAIN AND INDIA ]**



# CONSTITUTIONAL LAW

**T.Q.** *Discuss the nature and extent of the right to equality guaranteed by the Indian Constitution*

**Ans.** Under the Indian Constitution, seven types of fundamental rights have been given. The first type deals with the right to equality dealt with in the Articles 14, 15, 16, 17, and 18. The right to equality guarantees before law, equal protection of laws, equality of opportunity for all in matters of employment under the State, and prohibits discrimination against any one on grounds of religion, race, caste, sex, place of birth, etc. Now all these different items going under the name of right to equality may briefly be explained as follows.

Equality in the eye of law is a consequence of the concept of rule of law as expounded by Dicy, and means that no man is above the law of the land and every man, regardless of his status or rank is subject to the ordinary law and the ordinary courts of the land. It also means that officials and private citizens are equally under the same law to which all must answer for any act which it does not allow. Thus it may be said that the position in this respect is intended to be the same in India. But here also, as in England, certain exceptions are made. The President and the Governor during their terms of office and in the course of performance of their official duties are made not answerable to any Court of law.



Even criminal procedures cannot be started against them and the scope of civil procedure also has been severely restricted. Of course, these immunities do not prevent their being subject to impeachment. Needless to say, the exceptions extend to cover foreign sovereigns and their ambassadors.

“The concept of equal protection of the laws is old in Anglo-American jurisprudence, reaching at least to the 40th Article of Magna Carta which proclaimed ‘To none will we sell, to none will we deny, to none will we delay right or justice.’ The U. S. Constitution gave the concept current forms; and a modern Constitution would scarcely be complete without it.”

In announcing the right to equality, the Indian Constitution uses both the phrases “equality before law” and “equal protection of the laws.” This may seem tautological because fundamentally both come to the same thing. In early cases the judiciary in India made and attempt to distinguish the two concepts. But more recent Supreme Court cases have simply ignored the duality and decided the issues on reasoning similar to that of an American Court.

“In the U. S. A. the 14th amendment is a limitation upon the actions of the individual States but not upon the Federal, or Central Government. It has of course been recognised that this peculiar lacuna in the development of the American Constitution could give rise to anomalous instances of certain discriminatory practices being forbidden to State governments while the Federal Government engaged in them. As a result the Courts have, on occasion, been obliged to force the due process

of the 5th amendment to fill this obvious gap in constitutional drafting. The word State as used in the Indian Constitution has its generic meaning and applies to Central Government as well as to the component States.

The U. S. Constitution limits this protection to public, that is, State as opposed to purely private action. But in the U. S. the courts have gone a very long way to find a State element in action claimed to be private. And, importantly, the Courts in the U. S. have found State action whether the actors were of the legislative, executive or judicial branches. Indian doctrine applies to the legislative and the executive branches, but not to the judicial. India has a unified judiciary and an allegation of judicial discrimination can be dealt with on appeal, while in the U. S. the dual system of State and Federal Courts would in many instances prevent U. S. Supreme Court review of challenged judicial discrimination, in the absence of the applicability of the 14th amendment to the judicial branch.

‘The right to equal protection of the laws has two faces, one positive and one negative. In its positive aspect, equal protection ensures that persons similarly situated may share without discrimination in whatever benefits the law affords. In its negative aspect, it shields persons from the burdens which a legislative majority can impose on a minority and from any unfair acts by the agents of government.’

Then there comes the prohibition of discrimination on grounds of religion, sex, caste, place of birth, etc., and while Article 14 prevents discrimination only by the State, Article 15 goes a step further and protects the

individual against discrimination in shops, public restaurants, hotels and places of public entertainment where such discrimination is based on the grounds mentioned above or any of them. The Indian Constitution, however, introduces to the doctrine of equal protection the principle of protective discrimination which accounts for two exception in the application of Article 15, one being there originally and the other the result of the first amendment of the Constitution. These are : Art 15 (3) provides “Nothing in this Article shall prevent the State from making any special provision for women and children.” and Art. 15 (4) says “Nothing in this Article or in clause (2) of Art. 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes.”

Then there is also a guarantee of equality of opportunity in matters of public employment. There are here also certain exceptions consistently with idea of protective discrimination. In certain cases, Parliament may insits on residence within a State as a necessary condition ; certain reservations in service may be made by the State in favour of the backward groups ; offices associated with particular religions or denominations may be kept apart for people belonging to them ; claims of the scheduled castes and tribes will be given special consideration as far as is consistent with the maintenance of efficiency. These may be explained thus. First, in matters of employment under the Union, the question of residence or domicile does not arise but it may arise in the case of employment under a State government because

"it must be realised that you cannot allow people who are flying from one Province to another from one State to another, as mere birds of passage without any roots, without any connection with that particular Province, just to come, apply for posts and so to say, take the plums and walk away. Therefore, some limitation is necessary." But the power to make rules in this regard has been given to Parliament because that would ensure uniformity throughout the country and prevent variation from State to State. Secondly, special treatment for backward classes of the community also does not militate against the principle of equality, though the Constitution does not provide any definition of the term and its determination has been left to the States. And finally, it is also only fair that management of the affairs of any religious or denominational institution should lie with people belonging to them.

In this connection it may also be mentioned that "Although Article 15 guarantees equality of opportunity in matters of public employment for all citizens and is expected to provide a bulwark against considerations of caste, community and religion, the result has so far been far from satisfactory." For example, The Public Employment (Requirement as to Residence) Act, 1957 "seeks to repeal all existing domiciliary laws in the country which prescribe a period of residence within a particular State or Union Territory for any public employment there... Most of the States have also framed the rules to the effect that language is not a bar to recruitment." But these laws are still very far from proper implementation.

Finally with an eye to social equality, the Constitution abolishes untouchability and makes its practice in any form a penal offence. (Art. 17). From the same point of view, all titles save the academic and the military ones are abolished, the ban operating the State only and not against any other public institutions like the University (Art. 18). This, however, does not prevent the State from distributing distinction for any eminent service.

To conclude, a democratic State is that which takes as its aim the creation and maintenance of an atmosphere in which individuals have an opportunity to be their best selves. And it is accepted on all hands that liberty and equality are two most important ideas which go to the making of such an atmosphere. Hence no wonder that the Indian Constitution has laid such great emphasis on the right to equality. In view of many exceptions to the operation of the principle of equality accepted by the Constitution, there should not be any misgiving. / "In a sense these provisions may be conceived of simply as a constitutional enshrinement of the unexceptionable concept of classification which the Courts of the U. S. A. have always accepted. Classification is a constituent element of the doctrine of the equal protection of the laws. Equality has never been held to require that every single entity in a society must be treated like every other entity. Because society is not static, it follows that what may be acceptable classification in one country in one era may cease to be so in another. A fortiori, classification which appears to be desirable or permissible in

one country may not seem so to another, The classification that is permissible may depend upon many factors, with the test of reasonableness being ultimately applied and usually the State is entitled to a presumption of constitutionality. However, now in the U. S. the presumption of constitutionality is not normally applied when the allegation is that the impugned statute invades a civil or fundamental right.

Too much deference to the presumption of constitutionality can destroy the effectiveness of the equality provision. Of course, the size of the class designated is not necessarily material, it may be possible to create a constitutional class of one. ✓

"Inequality may result from discrimination which appears on the face of the Statute. But it is also possible for legislation to be fair on its face and yet be unequally administered. Finally, inequality may result from judicial interpretation which, as noted in the U. S. may give rise to a separately justiciable issue."

*Q. Discuss the nature and extent of the right to property under the present Constitution of India with special reference to the remedies available in cases of acquisition and requisition of property.*

**Ans.** Among the different kinds of fundamental rights guaranteed by the Constitution of India, the right to property is one. Article 19 confers on a citizen three specific rights, namely, to acquire, hold and dispose of property subject to reasonable restrictions. Article 31 deals with the right to property itself. Now to determine the nature and extent of the right to property

to-day requires us first to see what was done originally in the Constitution and what is the present position after several important modifications made through constitutional amendment.

Article 31 of the Constitution dealing with the right to property as originally passed reads as follows :

1. No person shall be deprived of his property save by authority of law.

2. No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition unless the law provides for compensation for the property taken possession of or acquired, and either fixes the amount of the compensation or specifies the principles on which and the manner in which the compensation is to be determined and given.

3. No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

4. If any Bill pending at the commencement of this Constitution in the Legislature of a State, has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

5. Nothing in clause (2) shall affect (a) the provision

of any existing law to which the provisions of clause (6) apply, or (b) the provisions of any law which the State hereafter make (i) for the purpose of imposing or levying any tax or penalty, or (ii) for the promotion of public health or the prevention of danger to life or property, or (iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise with respect to property declared by law to be evacuee property.

6. Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification ; and thereupon, if the President by public notification so certifies, it shall not be called in question in any Court on the ground that it contravenes the provisions of clause (2) of this Article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935. /

The Article in question may be said to serve three purposes, (a) to afford protection to private property in general, (b) to afford protection to certain special laws dealing particularly with Zamindari abolition, and (c) to do away with the need for the payment of compensation in certain specified cases.

But to-day we find this Article radically changed and it has been brought about in this way. First, in 1951, an amendment to the Constitution was passed which secured, among other things, that any law passed by the State for acquiring the right over any private property



or for deprivation or change in such right shall not be challenged in any Court.

Secondly, in 1955 was passed another amendment to the Constitution which introduced far-reaching changes in the Article 31. The original clause (2) was replaced by a new one which reads "No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which and the manner in which the compensation is to be determined and given ; and no such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate." This amendment also provides that where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a Corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property." (2A). Besides the State is also empowered to take over the management of any property for a specific period in public interest, to amalgamate two or more Corporations in public interest, to extinguish or modify the rights of managing agents, managing directors, directors, managers, and share holders of Corporations ; to extinguish or modify any right in mines or mineral oil by premature termination of agreements,

Thirdly, in 1964 came another constitutional amendment which gives a new definition of the term estate.

The net effect of this amendment is to empower the State to pay reasonable compensation to agriculturists in case of acquisition or requisitioning of land lawfully held by agriculturists

To sum up, we may say that there is a right to acquire, hold and dispose of property subject to reasonable restriction. It is also provided that private property cannot be taken away save by the authority of law passed by Parliament. This means for any interference with private property legislative action is necessary which is thus a limitation on the executive. Again, whenever there is to be any acquisition or requisition of private property by the State, it must satisfy two conditions, it must be for a public purpose and the law made for that purpose must provide for payment of compensation. But while payment of compensation is accepted on principle, its quantum has been made nonjusticiable, that is, the question as to the justness or otherwise of the compensation paid in a particular case cannot be gone into by any Court, the whole matter being left under the exclusive authority of the legislature. /

In view of this, it is perfectly correct to say that the right to property as a fundamental right does no longer exist, except in form. For such a view, the following arguments may be urged. The right to property may be said to have protection from three sources. Of these, that of the authority of law has little meaning in view of party government. As regards the requirement of payment of compensation, it is only a technical protection inasmuch as the offer of any positive quantity of of money above zero will satisfy the constitutional

requirement and that is non-justiciable. Thirdly, there is the protection offered by the requirement that there must be a public purpose to justify interference with private property,

“The expression ‘public purpose’ is not capable of a precise definition and has not a rigid meaning. It can only be defined by a process of judicial inclusion and exclusion. In other words, the definition of the expression is elastic and takes its colour from the statute in which it occurs, the concept varying with the time and state of society and its needs. The point to be determined in each case is whether the acquisition is in the general interest of the community as distinguished from the private interest of the individual.” And as regards whether the question of public purpose is a justiciable issue, the position is that it is. “If any person feels that his property has been compulsorily acquired or requisitioned for a purpose which he does not consider to be public, he can certainly approach the judiciary under Articles 226 and 32 of the Constitution for the vindication of his fundamental right to property. Although, therefore, the quantum of compensation payable under clause (2) of Article 31 of the Constitution is, as we have seen before, no longer justiciable, yet the question whether any property has been compulsorily acquired or requisitioned for a public purpose, is, it is submitted, a justiciable issue under it.”

Thus here is without doubt a valuable protection to the right to property. But there is more to it. Clause 2A of the article 31 empowers the State to deprive people of private property though “it shall not be deemed to

provide for compulsory acquisition or requisitioning of property." The official view of the meaning of this clause (2A) was put thus : "Where property is acquired for a public purpose or is requisitioned for such a purpose, then generally compensation will be payable in the manner and in accordance with the principles laid down by the Legislature but when property is not acquired for a public purpose, if it is confiscated, say under a law or is taken under management for a public purpose, and for similar other purposes.....then no compensation will be paid." But such a provision is full of dangerous potentialities, for, this clause has no reference "to any question of public purpose as we find in clause (2) of Article 31" ; "there is no safeguard in the form of any provision in Article 31 that a law as contemplated by clause (2A) must, if made by the Legislature of a constituent State in India, receive, as required in some cases by clause (3) of the Article, the assent of the President before it can have effect"; "power given by clause (2A) may be abused and in its actual working the clause may cause a great hardship and injustice to people without any legal remedy."

To conclude, "our Fundamental Right to Property has, as a result of the changes made in our Constitution ...become, legally speaking, whatever might be the socio-political justification of the changes, almost, unlike our other Fundamental Rights, a myth." "The legislature may now appropriate it (private property) at any price it desires substantial or nominal. There is no review of the reasonableness of the amount of compensation. The result can be just compensation or

confiscation—dependent wholly on the mood of the arliament.”

**Q.** *Discuss the rights of a person to protection against arrest and detention under Preventive Detention Act in India. Does it militate against rule of law ?*

**Ans.** Article 22 of the Indian Constitution guarantees three rights. First, it guarantees the right of every person who is arrested to be informed of the cause of his arrest ; secondly, his right to consult, and to be defended by a lawyer of his choice. Thirdly, every person arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours and shall be kept in continued custody only with his authority. All these rights are without any qualifications and are, therefore, in absolute terms. There are, however, two exceptions to the universal application of the rights guaranteed under the first two clauses of Article 22. These relate to (1) any person who is for the time being an enemy alien ; and (2) any person who is arrested or detained under any law providing for preventive detention. Of these two exceptions, the second one concerns us here.

As regards the meaning of the term preventive detention, Mukherjee, J. of the Supreme Court has said, “There is no authoritative definition of the term ‘Preventive Detention’ in Indian law.....The word ‘preventive’ is used in contradistinction to the word ‘punitive’...The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge

is formulated and the justification of such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence."

And as regards its scope, "under Article 246 of our Constitution, taken along with Item 9 in the Union List in the Seventh Schedule thereto, our Parliament has, except in respect of Jammu and Kashmir, an exclusive power to make laws in respect of preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India as well as for persons subjected to such detention. And it has also, under the same Article, taken along with Item 3 in List III in the same Schedule, a concurrent power of legislation, along with some States ( the Concurrent List in the Seventh Schedule to our Constitution is not applicable to the State of Jammu and Kashmir ) in respect of preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community as well as for persons subjected to such detention."

The first Preventive Detention Act was passed by Parliament in 1950. Very soon the Supreme Court had an opportunity of scrutinising Act in detail in *Gopalan v. the State of Madras*. After lengthy analysis of the scope of fundamental rights in general and the content of personal liberty in particular, the Supreme Court held by a 4-2 majority that the Act was valid except section 14 which was unanimously declared void. From then on both at the Centre and in may of the States, preventive detention laws have been made and remain in force even now.

Though the provision of the Constitution permitting preventive detention as well as the various Preventive Detention Acts, Central and State, have aroused a space of criticism, yet it should not be forgotten that the Constitution while permitting preventive detention also provides certain safeguards. These are : “first, every case of preventive detention must be authorised by law. It cannot be at the will of the executive. Secondly, no law of preventive detention shall normally authorise the detention of a person for a period longer than three months. Thirdly, every case of preventive detention for a period longer than three months must be placed before an Advisory Board composed of persons qualified for appointment as judges of a High Court. Such cases must be placed before the Board within the three month period. The continued detention after three months should be only on the basis of a favourable opinion by the Board. The only exception to this provision is when Parliament prescribes by law the circumstances under which a person be kept in detention beyond three months even without the opinion of the Advisory Board. Fourthly, no person who is detained under any preventive detention law can be detained indefinitely. There shall always be a maximum period of detention which Parliament is required to prescribe by law. Fifthly, in cases which are required to be placed before the Advisory Board the procedure to be followed by the Board shall be laid down by Parliament. Sixthly, when a person is detained under a law of preventive detention, the detaining authority shall communicate to him the grounds on which the order has been made.

It should also afford him the earliest opportunity of making a representation against the order." Now, let us explain these and see what they are really worth as safeguard for individuals against whom a preventive detention law is used.

The first five points may be taken together and explained thus. "On a careful perusal of clauses (4) and (7) of Article 22 together, it appears, in the first place, that preventive detention up to three months and without any reference to an Advisory Board, is permitted under our Constitution, provided that the law which permits this has been duly enacted; that, secondly, Article 22 ordinarily contemplates, as Fazl Ali J. has observed, three classes of preventive detention, (1) preventive detention for three months, (2) preventive detention for more than three months on the report of an Advisory Board; and (3) preventive detention for more than three months without any reference to any Advisory Board; and that thirdly, preventive detention is also permissible for any length of time, subject, of course, to the requirements or the duration of any validly enacted law providing for such detention."

Sub-clause (a) of clause (7) of Article 22 permits detention beyond a period of three months and excludes the necessity of consulting an Advisory Board and sub-clause (b) of the same clause of the same Article makes it "not obligatory on the part of Parliament to prescribe any maximum period." This means: "...the real purpose of clause (7) was to provide for a contingency where compulsory requirement of an Advisory Board may defeat the object of the law of preventive detention.



...The authority to make such drastic legislation was entrusted to the Supreme Legislature but with the further safeguard that it can only enact a law of such a drastic nature provided it prescribed the circumstances under which such power had to be used or in the alternative it prescribed the classes of cases or stated a determinable group of cases in which this should be done. The intention was to lay down some objective standard for the guidance of the detaining authority on the basis of which without consultation of an Advisory Board detention could be ordered beyond the period of three months."

And as regards the exact implication of the words, "the circumstances under which and the class or classes of cases in which" contained in the sub-clause (a) of the clause (7) of Article 22, the majority of the Supreme Court, in *Gopalan v. the State of Madras*, held these words to mean that "Parliament may prescribe either the circumstances under which, or the class or classes of cases in which, a person may be detained for a period longer than three months without reference to an Advisory Board" and that "it is not necessary that the Parliament should prescribe both."

And clauses (5) and (6) of Article 22 confer certain procedural right of a person detained under any preventive detention law. Clause (5) says a person detained under a law of preventive detention has a right to obtain information as to the grounds of his detention and has also the right to make a representation against an order of preventive detention. "This right has been guaranteed independently of the duration of the period

of detention and irrespective of the existence or non-existence of an Advisory Board." But there is no machinery provided or expressly mentioned for dealing this representation, the Constitution being silent as to the person to whom representation has to be made or how it has to be dealt with. Again, the "right to an oral hearing and the right to give evidence are not necessarily implied in the right to make a representation." Clause (6) says that a person detained under a preventive detention law has a right to be informed of the grounds of his detention, but permits facts as distinguished from grounds to be withheld. Thus "there is no provision for any trial before any tribunal."

In short, as Patanjali Sastri J. in the course of his judgment in *The State of Bombay V. Atma Ram Sridhar Vaidya* says, "it is now settled by the decision of the majority in *Gopalan's case*, that Article 21 is applicable to preventive detention except in so far as the provisions of Article 22 (4) to (7) either expressly or by necessary implication exclude its application, with the result that a person cannot be deprived of his personal liberty even for preventive purposes except according to procedure established by law." That is to say, "In order that a legislation permitting preventive detention may not be contended to be an infringement of the Fundamental Rights provided in Part III of the Constitution, Article 22 lays down the permissible limits of legislation empowering preventive detention. Article 22 prescribes the minimum procedure that must be included in any law permitting preventive detention and as and when such requirements are not

observed, the detention, even if valid *ab initio*, cases to be in accordance with procedure established by law, and infringes the fundamental right of the detainee guaranteed under Articles 21 and 22 (5) of the Constitution. In that way the subject of preventive detention has been brought into the Chapter on Fundamental Rights."

Again "our Supreme Court has by an overwhelming majority of five to one held that Article 19 of our Constitution has nothing to do with a law of preventive detention, duly made under Article 22 of the Constitution." Thus the contention that every case of preventive detention is the result not of executive whim but of law loses much of its value in the face of what Das J. of the Supreme Court has said "as regards preventive detention laws, the only limitation put upon the legislative power is that it must provide some procedure and at least incorporate the minimum requirements laid down in Article 22 (4) to (7). There is no limitation as regards the Substantive law."

Now, as regards the consistency or compatibility of this constitutional provision permitting preventive detention with the rule of law, the following points may be made. First, there is no doubt that "Preventive detention laws are repugnant to democratic Constitutions and they cannot be found to exist in any of the democratic countries of the world." (Mahajan J. in *Gopalan V. State of Madras*.) Secondly, there may be some differences of opinion as to the precise meaning of rule of law, but this much seems to be accepted on all hands, namely, rule of law must mean that "In time of peace, of course, a man can only be sent

to prison for crimes which he has committed in the past. He cannot be detained by the executive simply because they think he may commit crimes in the future." (Lord Denning—*Freedom under the Law*). Thirdly, it must be accepted that the power to make preventive detention orders is liable to abuse and hence spells a potential threat to personal liberty which is considered to lie at the very heart of the idea of democracy. The danger is all the more in view of the ouster of the judiciary in the matter. Thus even though in times of great emergencies constituted by, say, external aggression or internal subversion, such unlimited power with the executive may be tolerated as a necessary evil and that for a limited period only to provide for such laws even during normal circumstances is really going too far and may very well make a mockery of the cherished fundamental rights.

But even without denying the essential validity of the above points of criticism, on the other side at least two points may be made. First, an explanation, if not justification, of the constitutional provision, permitting preventive detention, is to be found in the circumstances immediately before and following independence of the country. It was not unnatural to take such an attitude in the prevailing conditions. And as and when the conditions change basically and a majority of the people can be persuaded to that view, the Constitution can well be amended to obliterate this what is said to be a spot on the Constitution. And, secondly, though it may be news to many, preventive detention not in times of emergency but in normal times of peace is

possible in England, of all countries. Here is what Dr. Jennings says, "Even 'preventive detention' is possible under English law, though it requires the order of a court and not merely a decision of the police. A court of summary jurisdiction may under the statute 34 Edw. 3, c. 1, and the Commission of the peace granted thereunder order a person to give sureties to keep the peace or to be of good behaviour 'towards the king and his people' or towards any private person. It is not necessary that any particular person should have been threatened, nor, indeed, that there should have been anything 'calculated to lead to a breach of the peace' in the sense of violence. In default of compliance with the order, a petty sessional Court may order the defendant to be imprisoned for a period not exceeding six months, though obviously he has committed no offence." (*The Law and the Constitution*. pp. 275-76). Thus if in England there is still rule of law, there is no reason why in India it cannot exist simply because there is preventive detention.

**A. Q.** *What practical purpose does the Crown serve in the English constitutional system? Can the President of India serve the same purpose? Discuss fully.*

**Ans.** On the precise position of the monarch in the English constitutional system, there are broadly two views. One is that the king is no more than a convenient working hypothesis, and the other view is that "it would be quite incorrect to suppose that because the Queen (or the king) occupies a strictly constitutional role, she (or he) is, therefore, a puppet monarch."

The first view contends that whatever the past and whatever the theory, at present the undeniable fact is that the monarch reigns but does not rule, has no effective power at all. But even then monarchy has been retained because it has contended to adjust itself with the changing reality and is no longer an effective barrier to popular rule. Also a head of the State is needed and in this respect a hereditary kingship may have certain advantages over an elective one, particularly when it is such an ancient institution and symbolises the continuity of tradition and history. But when all that has been said, the central fact remains that surrounded though he is with all the panoply and majesty of power, the king actually has no power, everything being done in his name by the representatives of the people.

Without denying the force and the central truth in such contentions, the other view asserts that it gives us at best an incomplete and inadequate view of the place of the institution of monarchy in the British constitutional life. This view says that in spite of the fact that Britain is at present a full democracy in the sense of sovereign power being in the hands of the people and exercised by their duly elected representatives, the monarch still has some important functions both ordinarily and under exceptional circumstances and puts its case in this way.

The modern State, like all States, requires a symbol of unity, a magnet of loyalty and an apparatus of ceremony which will serve to attract men's feelings and sentiments into the services of the community. The

ceremony with which the monarch is surrounded repays the cost in a rich return of the political sentiments and emotions which nerve and sustain a community. The monarch on the ceremonial side is the fountain of honours. The system of honours does not mean any privileged class, honours being spread nation-wide. Also the monarch has an actual and practical importance in giving to the whole of government a prestige which it would not otherwise possess.

But the monarch has an actual and practical importance in another more obvious, more direct and more active way. The monarch is regularly informed and regularly consulted, day by day, week by week. The prime minister is in constant touch with the monarch regarding the proceedings of Parliament, of the cabinet, the course of policy, the conduct of negotiations and the whole range of executive action. A head of the State who enjoys a life office by hereditary right not only saves the States from the perturbations of periodical presidential elections, he (or she) can also give it the positive service of a ripe experience and a disinterested judgment of affairs. It is so because while the ministers come and go, the monarch remains and continuous tenure of a life-office makes a sovereign a central source of long-time experience. For example, discussing the relation between the monarch and the cabinet, Jennings remarks that the Queen (or the king) is better informed than the average cabinet minister on the matters which are brought before the cabinet, and that the Queen may be said to be almost a member of the cabinet and the only non-party member. And

in practice, it is seen that the monarch by virtue of this pre-eminent and non-party position can exert a good deal of influence on a cabinet decision as well as its practical implementation through the various administrative departments.

There is another way in which the monarchy has an actual and practical importance in the working of the Constitution. Every Constitution may be said to represent an attempt at balancing of different factors. In Britain this is sought to be done in this manner. General authority, alike for the initiation of legislative measures and for the conduct of executive affairs, is vested in the Prime Minister and his Cabinet. But the monarch serves as the balance. The existence of the monarch provides a cover and a dignity to the opposition as well as to the government. The existence of Her Majesty's Opposition shows that the Queen's mantle is wide enough to cover the opposition as well as the government. Thus the Queen is an organ of balance by virtue of providing the cover and the sanction for the opposition which serves as a counter-weight to the government. But the Queen is also an organ of balance in and by herself. She embodies and it is her specific and separate function to embody a fund of national political sentiment which is something separate from the party feeling which supports both her government and her opposition. And in the conduct of foreign relations also, the monarch has much the same place and function as in the conduct of domestic functions.

Aside from these important functions performed by the monarch, normally, under ordinary circumstances,



there is also a scope for the King or the Queen to exercise some individual discretion under certain conditions. In the first place, the monarch invites the leader of the majority party to become the Prime Minister and normally there is no question of a choice in the appointment of a Prime Minister. But if no party has an absolute majority in the House of Commons, the monarch exercises an element of choice in selecting the Prime Minister. Again, the sovereign can have the same opportunity to use discretion in case a party is without an accepted leader either through sudden death or through internal squabbling. Secondly, the monarch exercises rights in connection with the question of dissolution of Parliament. Normally this function is exercised on the advice of the Prime Minister, but it cannot be said that a Prime Minister can have a dissolution of Parliament under all circumstances. "The Crown is not bound to take the advice of a particular Minister to put its subjects to the tumult and turmoil of a series of General Elections so long as it can find other Ministers who are prepared to give contrary advice."

Finally, last but not least, Bagehot's remark that "the Crown has three rights, the right to be consulted, the right to encourage, the right to warn," conveys an important part of the truth about the place and importance of the monarchy in the British constitutional life.

To conclude, it is not proper to look upon the British monarchy as entirely a formal and ornamental affair. Rather, the truth appears to be well put in the remark of Lord Esther to the effect that "no one acquainted with the inner working of the Constitution can doubt

the enormous powers retained and exercised by the sovereign."

Now the question is whether the President of India can serve the same purpose in the Indian constitutional life. Of course, a definite answer to that question is impossible, because it depends on too many imponderables. But what is possible is to make certain points drawing attention to the similarity and dissimilarity between the two offices. As regards similarity, both offices are of great dignity and enormous formal power. And in view of the expressed intention of the makers of the Indian Constitution as well as of certain other provisions of the Constitution, the President of India also is to have a purely constitutional role, symbolising the unity of the nation and the State above all party considerations. But the points of dissimilarity are more important. First, India has a written Constitution and this explains the rather vagueness left in the Constitution about the position of the President. This element of uncertainty about the position of the President derives from the natural difficulty that must ensue an attempt to state precisely in a written Constitution certain well established conventions of an unwritten Constitution.

Secondly, the President of India owes his position to election and not heredity as is the case with the British monarch. Since the President is eligible for re-election it may be suggested that he must have some responsibility to his constituents whom he cannot satisfy without some freedom of action.

Thirdly, "India has a federal Constitution which divides the powers of the Government between a Central

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Government and the State Governments. The President should not be either a partisan or a silent partner if the Central Cabinet through its dictatorial actions try to subvert the federal structure of the Constitution."

These and many other provisions of the Indian Constitution show that there is a distinction between the President as a mere titular head of the Union and an arbiter or umpire between competing claims and contesting parties. Thus it is better not to equate the position of the President with that of the British monarch. But nevertheless it may be said that there is no reason why the President cannot be a purely constitutional head like the British monarch and yet, again, like the British monarch, exercise "an effective, influential and sobering force." In other words, despite some basic differences between the two offices stemming partly from the nature of the respective Constitutions and partly from the exigencies of situations naturally different in the two countries, whether and how far the President of India will serve the purposes served by the monarchy in Britain is not so much a matter of law or Constitution as of politics, and that is why, though to predict anything about the future political development is always risky, yet it may be said that there is no inherent reason why the future political development in India should not go along the British model in this regard.

*.Q. Discuss the constitutional position of the Governors of the States in India in relation to the Council of Ministers.*

*Ans.* As regards the constitutional position of the Governors of the States in India, the important question

is whether the Governor is a fully constitutional head. According to some people, he can by no means be regarded as a fully constitutional head because of the constitutional provision vesting in him certain discretionary powers. The Constitution says that there shall be a Council of Ministers to aid and advise him in respect of matters other than those falling within his discretionary powers. Again, the Constitution, apart from giving one or two illustrations, does not make it clear as to what are the matters in respect of which the Governor can properly exercise his discretion. Also, in a case of exercise of discretion by the Governor, the question of propriety or impropriety cannot be raised.

Now those who look upon the Governor as a mere constitutional head, base their case on the fact that the Constitution does not elaborate on the discretionary powers of the Governor. They tend to dismiss the one or two examples given in the Constitution as rather exceptional and maintain that the Governor is always bound to act according to the advice of the Ministry. Their position, in the words of the Calcutta High Court is as follows : "The Governor under the present Constitution cannot act except in accordance with the advice of his Ministers. Under the Government of India Act, 1935, the position was different.... Under the present Constitution the power to act in his discretion or in his individual capacity has been taken away. The Governor, therefore, must act on the advice of his Ministers."

But with all respect to the Court, it must be said that the view cannot be accepted. Even though it is conceded that normally the Constitution provides for respon-

sible government, in which naturally the Governor cannot but be a constitutional head, it nevertheless has to be pointed out that under certain circumstances at least the Governor does have some power which is by no means merely normal. And such a view is reinforced by the express constitutional provision that it is for the Governor to determine the field of action in which he is constitutionally required to act in his discretion and that such determination is not subject to any challenge. Thus it is not at all unreasonable to say that the Constitution does empower the Governor to act in certain cases without the advice of his Ministry. A number of examples may be given. If after the general election, no party can show a clear majority in the State legislature, the Governor naturally will have an important role to play in selecting a Chief Minister. Secondly, although the Governor will not normally dismiss a Ministry so long as it enjoys the confidence of a majority in the Assembly, yet the Governor's use of his discretion to dismiss a Ministry which still enjoys the support of a majority ( after consultation with the President ) will be justified if he is convinced that there have been clear cases of corruption to which the Ministry is a party and in the interests of purity in administration, the Ministry should be dismissed from office." "The discretionary power of the Governor to dismiss a Ministry also seems to exist if the Governor has reasons to believe that the Ministry is engaged in activities which are likely to endanger national security or solidarity."

Thirdly, the power to dissolve the Assembly is with the Governor who, it has been now fairly established,

can act in his discretion in this regard and the existing Ministry's advice on this point is by no means binding upon him.

Fourthly, there is the power of the Governor to ask for information from the Chief Minister relating to legislative and administrative matters. Regarding this power it has been said that there is a distinction between the functions and the duties of the Governor—the former having no scope for discretion while the latter have—and the duties which relate mainly to seeing that the administration is carried on at a level which is regarded as good, efficient and honest administration require the Governor to possess such information, if the duties are to be properly done.

Fifthly, “under Article 167 (c) the Governor is empowered to ask the Chief Minister to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.”

Sixthly, Article 200 empowers the Governor, in his discretion, to return a Bill for reconsideration with suggestions for amendment. And the same Article also empowers him to reserve a Bill for consideration of the President.

Seventhly, though the Governor exercises his ordinance-making power with the aid and advice of the Ministry, yet there are circumstances under which the Governor cannot promulgate ordinances without prior instructions from the President, and naturally here discretion comes into play.

Eighthly, the Constitution charges the Governor

with reporting to the President as to whether the State administration is being carried on with due deference to the Constitution. This really amounts to a confidential report on the working of the Ministry from the Governor to the President and it is easily conceivable that in this case the Governor cannot take the advice of the Ministry, particularly if anything adverse is to be said.

And finally, there is the discretionary power of the Governor of Assam regarding "certain administrative matters connected with the tribal areas and settling disputes between Government of Assam and the District Council ( of an autonomous district ) with respect to mining royalties."

Thus the fact that the existence of discretionary powers of the Governor cannot be denied and also the fact that immediately after defining the relationship between the Governor and the Council of Ministers, the Constitution declares "If any question arises whether any matter is or is not a matter which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question, on the ground that he ought or ought not to have acted in his discretion." Art 163 (2), show—

"(a) that the framers of the Constitution contemplated the exercise of discretionary powers of the Governor

(b) that such exercise is not confined to one or a few occasions which can be precisely defined and embodied in the Constitution ;

(c) that it is a power which is of a general nature and its use by the Governor will depend upon the circumstances that obtain in the State in a particular context or situation ; and

(d) that the use of discretionary power by the Governor should be guided by conventions that grow up from time to time in the working of the Constitution."

All these make it perfectly clear that the Governor is not wholly a constitutional head. He is so under normal circumstances and when there is a stable Ministry enjoying the support of a majority in the Assembly. But besides this, he also has a sphere in which he can use his discretion. This possession of discretionary power, however, should not be taken to mean that his position is one of unchallenged supremacy. Here comes the question of his role as an agent of the President. And "The Governor has to strike a balance between his role as constitutional head of the State and his role as the representative of the President."

"All things taken together, the emphasis on the Governor's office seems to be on his role as an adviser. On the one hand, he is a non-partisan adviser to the Ministry. By virtue of his position as the Head of the State he has a right to be consulted, the right to encourage and the right to warn.....On the other, he is the agent of the President, his adviser on the affairs of the State and the representative of the Union in the State. He is the link that fastens that Federal-State chain, the channel which regulates the Union-State relationship."



**Q.** *What is the extent of the Executive powers of the Union and of the State in the Constitution of India ?*

**Ans.** Distribution of power between the Union and the Units may well be regarded as the sine qua non of a federal system. This may take different forms according as different principles are followed, time, place and circumstances being the determining factors. And on these may depend the nature and extent of federalism of a particular Constitution. Accordingly, in spite of the Indian Constitution showing a rather high degree of centralising bias, the basic fact of an essentially federal system as based on a division of power between two parallel sets of government cannot be denied. Despite the presence of rather too many agencies and devices through which the Union can exercise control over the Units, the fact remains that under the Constitution the States are not mere delegates of the Union and the powers of both must be exercised under some limitations coming from the source, the Constitution itself.

This distribution of power, again, proceeds along two lines, "the territory over which the Federation and the Units shall, respectively, have their jurisdiction and the subjects to which their respective jurisdictions shall extend." The Constitution of India also follows these lines and the arrangement under it is as follows : The territory to which the jurisdiction of a State extends is naturally limited to its own boundaries while the Union is not so limited. Thus the Union enjoys a jurisdiction over the entire territory of the Union of India though its power is subject to certain constitutional limitations.

It is natural that in a federal system not only legislative but executive power also is to be divided between the Union and the units. In India, the division of executive power in general follows the lines laid down by that of legislative power, in that the States will have executive power limited to their respective territories and to those subjects over which they have legislative authority, and the Union will have executive power in respect of matters over which Parliament has legislative power and matters in which it exercises power by virtue of any treaty or agreement. So far the matter is simple but it becomes more complicated as regards the concurrent list.

Regarding the matters contained in the concurrent list, the Indian Constitution follows an arrangement that is broadly similar to the one prevalent in Australia. It is said that the executive power in respect of these matters will generally lie with the States but in certain cases Parliament can, by law, empower the Union government to exercise the executive authority. The position of the Union in this regard may be spelled out thus : (a) where Parliament by law vests the executive power with the Union, (b) where the Constitution itself gives such power to the Union, (c) where the question of implementing any treaty or agreement is involved, executive power will lie with the Union. Besides, the Union has the power to give direction to the States in order "to ensure due compliance with Union laws and existing laws which apply in that State," to ensure that the exercise of the executive power of the States does not interfere with the same by the Union, "to

secure the construction and maintenance of the means of communication of national or military importance by the States," and "to secure protection of railways within the States." This power to issue direction to the States also exists in matters involving the welfare of the scheduled tribes of the State, the provision of mother tongue as the medium of primary instruction for linguistic minorities and the development of the Hindi language.

These powers of the Union already broad as they are, still more enlarged during an emergency when, the Constitution provides, the Union will have the power to dictate the manner in which the power of the State is to be exercised, relating to any matter. If the emergency is declared on the ground of failure of constitutional machinery in the State, the President can assume to himself all or any of the executive powers of the State. And during a proclamation of financial emergency, the Union may lay down certain financial cannons to be followed by the States, may reduce the salaries and allowances of all or any class of government employees, including the Judges of the Supreme Court and the High Courts, and may direct that all money or financial bills are to be kept reserved for the consideration of the President after they are passed by the State legislatures.

And in this field of administrative relation between the Union and the Units, two other points should be noted. First, in the field of legislative power, the Constitution does not allow either the Union or one or more of the States to make encroachment upon each other's jurisdiction even by mutual consent but this is

allowed in the field of executive powers. And, secondly, Parliament by law may authorise the Union government to delegate some of its functions to the State government or its officers, irrespective of the consent of such State government.

A glance at the distribution of legislative power between the Union and the Units under the Indian Constitution shows clearly its unmistakable bias towards a very strong Union. Such a step has been sought to be explained and justified in the name of exigencies of circumstances as well as the needs of a nascent nation. However that may be, the fact of the very strong centralising bias of the Constitution is there not to be denied. And the same idea is reinforced by an examination of the administrative relation between the Union and the States secured by the Constitution. The essence of the federal idea is division of power as well as maintenance of co-operation between the Union and the Units but the system is so arranged that both sides can co-operate on a level of co-ordinate status. But clearly the Indian Constitution does not go that way and binds the States in what has been called subordinate co-operation. In this connection pointed reference is made to "the role of the Planning Commission, an extra-constitutional body created by the centre and the manner in which it acts as a super-Cabinet for the whole of India directing and regulating the entire socio-economic activity on a national basis."

It would not, however, do to forget that any superseding of the federal arrangement that might have been brought about through the mechanism of economic

planning is purely a matter of agreement and consent, the planning not having any constitutional or statutory powers. And this seeming erosion of the federal idea has been possible because of the same party ruling both at the Union and at the States right since Independence, the Communist rule in Kerala being just a brief episode in the long story, but this rule of the same party may not remain and then the undoubted constitutional autonomy of the States will be fully revealed.

To conclude, it is undeniable that the Constitution formally makes the Union much stronger than the States and the Union has been given a vast array of powers to discipline the States during emergencies as well as normal circumstances. But that alone should not be allowed to determine our view of the kind of system that the Constitution establishes. For the real character of the system is much more a matter of practice than theory. And the actual practice, economic planning notwithstanding, shows a good deal of federalism. The States in India can by no means be regarded as mere delegates of the Union. "A local executive fully responsible to the local legislature ensures a good deal of local internal sovereignty and sovereignty means a statehood, limited as it may be by the distribution of powers. Local States pursue local policies, sometimes in accordance with the policy of the centre, sometimes not. This distinguishes them precisely from the position which prevails in administrative federations in which local units must toe the line and always follow the policy of the centre." Thus any predominance of the Union over the States to be found in the theory and practice of the

Indian Constitution need not necessarily be taken as a departure from the federal idea but may well be explained as just another manifestation of the world wide centralising tendency from which even the established federations such as the U. S. A., Switzerland, Australia, etc. are seen not be immune.

7. Q. *"The Constitution of India is a written Constitution and though it has adopted many of the principles of the English Parliamentary system, it has not accepted the English doctrine of absolute supremacy of Parliament in matters of legislation."* Discuss fully, pointing out the limitations, if any, to Parliamentary sovereignty in India and Britain.

Ans. Sovereignty or supremacy of Parliament is a basic feature of the British Constitution. "Parliamentary supremacy implies two important principles. In the first place, Parliament has legal power to enact, amend or repeal any statute whatsoever, to amend or rescind any rule of common law, to override any decisions of the courts, and to make any established constitutional convention illegal. In the second place, no other authority or agency has the power to override or set aside anything that Parliament does." Thus, in law, Parliament has literally absolute power to do anything and everything it likes. And, in the context of the British Constitution, when any action of Parliament is criticised as unconstitutional, the meaning is not that Parliament does not have the constitutional authority to make the enactment in question but that simply it is "considered to be out of keeping with previously accepted

fundamental law" which, however, by no means implies that if adopted it would not be valid.

Now what do we see if we consider the Indian Parliament's claim to sovereignty in this light? We find that the Indian Parliament is not sovereign in the sense in which the Parliament in Britain is sovereign and that for the following reasons.

In the first place, the Constitution in India is a written document and a written document almost inevitably implies some limitations on the governmental organs which are always under obligation to work within the framework provided by the Constitution which is the fundamental law of the country. Secondly, the Constitution of India establishes a federal system characterised by a division of power between the Union and the Units, the result being that all powers are not within the scope of the Union. Thirdly, since in a federal system the Units are given a jurisdiction which is constitutionally made free from interference by the Union, except under certain stated circumstances, the existence of the sphere of the Units constitutes a limit to the competence of the Union. And, fourthly, the Union itself has a legislative power which must always respect certain constitutional limits and the laws of the Union are generally subject to judicial review. In short, the Parliament in a federal system cannot in the nature of things be a sovereign body in the sense in which the British Parliament is sovereign. This is also the case in the United States of America where the Congress has only a limited power of law-making, being permitted by the Constitution to make law only on eighteen topics

and its laws are really of the nature of bye-laws valid whilst within the authority conferred upon it by the Constitution but invalid or unconstitutional if they go beyond the limits of such authority."

Now, Prof. D. N. Banerjee is of the opinion that despite the arguments put above, it is not proper to describe unqualifiedly our Parliament as non-sovereign. He says it is partly sovereign and partly non-sovereign. And for regarding the Indian Parliament as partly-sovereign, his main argument is put thus: "Our Parliament is virtually, under what may be referred to as the first paragraph of Article 368 of the Constitution, also a sovereign law making body, like the British Parliament, for the purpose of effecting certain constitutional amendments, with only some slight procedural change.' Also, the limitation that is inherent in a written Constitution is thought by him to be not of much value inasmuch as "a classification of constitutions on the basis of whether they are written or unwritten is illusory."

But, it may be pointed out that Prof. Banerjee's contention is not tenable as is evident from the fact that in order to show the sovereign character of the Indian Parliament, he has to introduce two qualifications in one sentence. In point of fact, what he does is to show that the Indian Parliament is "virtually" sovereign and even that "with some slight procedural changes." But through these two loop-holes the whole case is given away because the British Parliament is sovereign with no "virtually" about it and with no "some slight procedural changes." In one word, to



try to put the Indian Parliament on a par with the British Parliament so far as the question of legislative supremacy is concerned is stretching a bit too far involving violence to facts.

In other words, the Constitution of India is the supreme law of the country. Though the Parliament in India has been empowered to make certain amendments, yet that also is a power granted by and under the Constitution which must always be accorded with the primacy of respect. Also the character of a Union legislature under a federal system simply cannot be like that of the Parliament in Britain where the Constitution is both unwritten and unitary. Therefore, it is perfectly justifiable to say that though the Constitution of India "has adopted many of the principles of the English Parliamentary system, yet it has not accepted the English doctrine of absolute supremacy of Parliament in matters of legislation."

Finally when it is said that the Parliament in Britain is sovereign, what precisely is meant? "It is generally agreed that Parliament is a sovereign body which can repeal or amend by way of a simple majority in both Houses even the most time-honoured principles of the Constitution. This principle is, however, established more by a series of *obiter dicta* by eminent persons, whether sitting on the Bench or in the professorial study, than by any judicial decision of binding authority. Indeed, if we confine ourselves to the law reports, it has never been decided either that Parliament is a sovereign body or that one of its acts cannot be challenged. Further, the moral validity of the principle

has been doubted—often by the same persons who expounded it. But by 1940 a new doctrine had begun to make considerable headway.....The concept of sovereignty, as a result of a cautious and subtle re-examination from within its own four corners, as it were, has been shown to be at once more complex and less terrifying than had been thought ...the new view can be summarised thus : (1) Sovereignty is a legal concept : the rules which identify the sovereign and prescribe its composition and functions are logically prior to it. (2) There is a distinction between rules which govern, on the one hand, (a) the composition, and (b) the procedure, and, on the other hand, (c) the area of power of a sovereign legislature. (3) The courts have jurisdiction to question the validity of an alleged Act of Parliament on grounds 2 (a) and 2 (b), but not on ground 2 (c). (4) This jurisdiction is exercisable either before or after the Royal Assent has been signified in the former case by way of injunction, in the latter by way of declaratory judgement."

2. *To what extent, if at all, is it permissible for the Parliament of India to delegate its functions ? What are the limitations on such powers ? Discuss the possibility of judicial control of delegated legislation under the Constitution of India.*

**Ans.** The term delegated legislation also, like many other legal and constitutional terms, comes from British constitutional law. In Britain, delegated legislation is legislation not by Act of Parliament but by Orders-in-Council, Orders, Warrants, Regulations and Rules

and has been a part of the parliamentary system for at least six hundred years. Parliament, however, made but sparing use of the power until the end of the nineteenth century when a changing idea of the part to be played by the State in the life of the community made inroads upon parliamentary time and made the system to be adopted on a more extensive scale. And during the twentieth century, the ever increasing activity of the State has meant still more pressure on parliamentary time a result of which has been the general acceptance of the system of delegated legislation with almost every Act of Parliament containing provision for its use.

In India, during the British rule, the system was not unknown. But since the creation and adoption of the new Constitution meant an entirely new basis of constitutional life, whether the system of delegated legislation was permissible under the new Constitution became a debatable point. An opportunity soon arose for having an authoritative opinion on the point. The President of India under Article 143 of the Indian Constitution referred the Delhi Laws Act 1912, the Ajmer-Merwara ( Extension of Laws ) Act 1947, and Part C States ( Laws ) Act 1950 to the Supreme Court for opinion. A full bench of seven judges of the Supreme Court considered the issue and decided by a majority opinion that the Indian Constitution did not permit the legislatures to delegate their respective legislative functions.

Generally speaking, delegated legislation in the sense of the legislature delegating its power to some

other branch of the government, say, the executive, for example, may be prohibited on the basis of three broad principles. First, there is the principle of the separation of powers and this theory, as a fundamental feature of the U. S. Constitution, has been seized upon by the judiciary there to prohibit the Congress from delegating its legislative power to any other organ of government. But obviously in a parliamentary system like the Indian one, the theory does not apply and thus was rejected by the Supreme Court of India as a governing principle in this regard.

Secondly, there is the principle that a power which is itself delegated cannot be delegated again. This principle also, while applicable in the U. S. A., was not considered so in the Indian context because, in the opinion of the Supreme Court, the Legislatures here were not delegates of any other authority but autonomous authorities.

Thirdly, there is the principle of Constitutional Trust and Implied Prohibition and it was this principle that the Supreme Court applied in reaching its opinion. The Court analysed various Articles of the Constitution in the light of this principle and reached the conclusion that "though the constitution did not expressly vest the legislative power in the Legislature, it had made elaborate provision as to how and by whom the legislative power was to be exercised and the very fact that in some cases, for example, in emergency, it expressly provided for a delegation of legislative power showed that the intention of the Constitution was that the legislative function must be exercised by the

Legislature itself and that outside the express provisions contained in the Constitution itself there could be no delegation of the legislative power. The doctrine, however, was confined to the essential functions of the legislature because delegation as to matters of detail was a necessity under modern conditions.

And, in the opinion of the Supreme Court, the essential functions of the Legislature include (1) "to declare what the laws shall be in relation to any particular territory or locality; (ii) the power to extend the duration or operation of an Act beyond the period mentioned in the Article itself; and (iii) the power to modify an Act without any limitation to the extent of modification.

Thus, in summary, we may say that the Supreme Court was "reluctant to accept transfer of power to the Executive in the matter of essential legislation, which would have resulted in deligation in the strict sense." The Court, however, "admitted the possibility of transfer of non-essential legislative power relating to conditional and subordinate legislation." There are two Articles in the Constitution, however, which allow delegated legislation in the strict sense of the word. "According to Article 353 (b) Parliament, in case of a proclamation of emergency by the President, is competent to confer power on the Union and on officers and authorities of the Union. Similarly, according to Article 357 in case of failure of the constitutional machinery in a local State, Parliament can delegate the power of the Legislature of the State to the President." Apart from the conditions enumerated

by these two Articles, delegation of essential legislative power is not permitted under the Indian Constitution as interpreted by the Supreme Court. This does not, however, preclude the executive authority from being vested with the power to make what is called subordinate legislation, a power which includes that of modifying existing or future laws, except for essential changes which basically mean a change in policy.

In India for control of this subordinate legislation, there are three methods available. One is control by parliament, another is control by the Judiciary and another is by publicity or public opinion. The principle that all subordinate legislation is ultimately subject to parliamentary control is a basic one. There is a Committee on Subordinate Legislation in the Lok Sabha. The function of this Committee is to examine all laws vesting the power of subordinate legislation to the executive and also whether and how far subordinate legislation conforms to the lines laid down in the laws and report to the Lok Sabha. According to the Rules of Procedure and Conduct of Business of the Lok Sabha, the Committee has the responsibility of examining whether (a) the subordinate legislation is consistent with the purpose of the law vesting such authority, (b) the subordinate legislation results in any taxation, (c) the area of the judiciary is transgressed upon directly or indirectly, (d) it results in any expenditure from the State exchequer, (e) executive makes any unusual or unexpected application of the power vested in it by the original law and (f) there has been undue delay in matters of publicity or in laying the rules before Parliament. The Committee can also

**recommend the repeal or amendment of any such rule made under this heading of subordinate legislation.**

As regards the power of the judiciary in the matter of control over subordinate legislation, the first point to be examined by the judiciary is whether the original law creating the scope for subordinate legislation is valid and consistent with the Constitution. It goes without saying that if the original law is declared invalid, any subordinate legislation made under its authority is also automatically invalid. Secondly, the judiciary can also invalidate any subordinate legislation on the ground of its being inconsistent with the Constitution. In considering the consistency of any subordinate legislation with the Constitution, the judiciary has also the power to go into the question of the former's reasonableness, for instance, any such legislation resulting in restriction upon rights guaranteed by Article 19 has to be reasonable or else the Courts can declare it void on the ground of its conflict with the Constitution. Thirdly, the judiciary also has to see if subordinate legislation has been in excess of the power and authority provided by the original law. If there has been any such overstepping the limit, the judiciary can declare all such rules void. Here, however, the Courts cannot raise the question of the reasonableness of the rules, that is, the Courts cannot examine the principles behind the rules.

Finally, as regards due publicity, the following may be said. While the law made by the legislature, Union or State, is made publicly and can, therefore, be enforced from the date on which it receives the assent of the President or the Governor, as the case may be, the same

cannot be said about subordinate legislation. In the *State of Kerala vs Joseph* ( 1958 ) the opinion of the Supreme Court was that according to the principle of natural justice, people cannot be regulated by a rule which was not duly made known to them. Thus, though every law providing for subordinate legislation also provides for due publicity for the subordinate legislation made thereunder, yet proper care should be taken and necessary arrangement made to make as wide as possible publicity of all subordinate legislation.

Q. *"We are under the Constitution but the Constitution is what the Judges say it is."* Explain and show how and to what extent the functions of the Supreme Court in India differ from those of the Supreme Court in the U. S. A. in this regard.

Ans. The most distinctive feature of the American federal judiciary is its power of judicial review. It means the power to determine whether a law of the Congress or any provision in a State Constitution or any law by any State legislature or any other public regulation having the force of law, is consistent with the Constitution of the U. S. A. The Courts and ultimately the Supreme Court decide this question in course of their actual business of deciding cases which come before them. The Courts will examine whether a law on the validity of which the particular case may turn, is in conformity with the Constitution. If it is not in the opinion of the Court, it refuses to give effect to it which thus becomes nullified because thereafter neither the Supreme Court nor any other Court will recognise it as law and enforce it.



This power of judicial review is enjoyed by all federal Courts but their judgments can be appealed against and reversed in the Supreme Court which thus has the final authority of deciding the constitutionality of any law. In the States, the highest Court in each enjoys such an authority in relation to the laws made by the State legislatures.

This power of judicial review over an act of Congress was first asserted by the Supreme Court in the famous case of *Marbury vs. Madison*. For assumption of such a power by the Court, there is no constitutional sanction of an explicit nature. But it has become an accepted fact, though somewhat controversial, in the American constitutional system and has been supported by great authorities like Chief Justice Marshall, Kent, Webster, Story, Cooley, etc. The gist of their reasoning in justification of this practice of judicial review may be put thus.

That the Constitution is the supreme law of the land is not doubted by any one. But the Constitution is a written document and like any other written document, needs interpretation. Thus an agency to provide us with authoritative interpretation is needed, and that for two reasons. First, the Constitution being the supreme law of the land cannot be properly observed without a proper knowledge of what it means, that means, interpretation. And secondly, the supremacy of the Constitution means that nothing can be done which is not consistent with the Constitution, that again means interpretation. "The interpretation of the laws is the proper and peculiar province of the Courts. A Constitution is in fact, and must be regarded by the judges as,

a fundamental law. It must, therefore, belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred ..”

Thus it is that the Supreme Court has become the ultimate authority on the interpretation of the Constitution and the almost unparalleled authority of the Court in this regard is conveyed in the saying, of a Supreme Court Judge, that “we are under the Constitution but the Constitution is what the Supreme Court says it is.”

But the doctrine of judicial review may also be supported in other ways. For instance, it is said that a federal Constitution distributes power between a Union and a number of Units and all are expected to remain within their respective constitutional limits. Such an arrangement, however, implies the presence of an authority to see to the maintenance of the system established by the Constitution. And such an authority cannot naturally be found in either the Union legislature, or the Union executive, or even the Units, for, that would almost certainly tend to upset the federal balance. Thus an independent authority in the form of a Supreme Court becomes the best possible choice.

Now, India also has a written federal Constitution with its necessary implication of the practice of judicial review for maintaining the supremacy of the Constitution, for seeing that both the Union and the Units remain within the constitutional limits prescribed for each, for

seeing that the constitutionally guaranteed fundamental rights are properly observed, and finally for providing final authoritative interpretation of the Constitution, when necessary. But the acceptance of the doctrine of judicial review in India unlike in the U. S. A., is qualified, "Our Constitution, unlike the English Constitution, recognises the Court's supremacy over the legislative authority, but such supremacy is a very limited one, for it is confined to the field where the legislative power is circumscribed by limitations put upon it by the Constitution itself. Within this restricted field the Court may, on a scrutiny of the law made by the Legislature, declare it void if it is found to have transgressed the constitutional limitations. But our Constitution, unlike the American Constitution, does not recognise the absolute supremacy of the Court over the legislative authority in all respects, for outside the restricted field of constitutional limitations our Parliament and the State Legislatures are supreme in their respective legislative fields and in that wider field there is no scope for the Courts in India to play the role of the Supreme Court of the United States." In other words, under the Indian Constitutions, the doctrine of judicial review applies in certain cases and certain matters have been deliberately kept out of its field of operation.

The most important example of the matters in which judicial review applies is provided by the fundamental rights and there cannot be any law that takes away or abridges these rights. Again, the Supreme Court is the final interpreter of the Constitution of India. And as regards the matters kept beyond the purview of judicial

scrutiny, some of the more important ones may be put as follows.

“1. No law laying down procedure for arrest and detention of individuals and even for taking their lives can be challenged by the Supreme Court or other Courts. But if any particular provision in these laws is inconsistent with any provision of the Constitution itself, it can be declared void by the Supreme Court and other Courts. .

2. No law laying down any principle of any compensation for the acquisition of the property by the State can be questioned by the Supreme Court or other Courts on the ground that compensation is unjust, unreasonable or insufficient. The principle of compensation laid down by the legislature is final.

3. Certain electoral matters have been placed beyond the jurisdiction of the Supreme Court and other Courts. No law relating to delimitation of constituencies or allotment of seats to those constituencies can be questioned before the Supreme Court or other Courts.

Thus, it is clear that as far as the power of judicial review goes, the scope of the Indian judiciary is definitely much more limited than that of the judiciary in the U. S. A. where the power of the judiciary has made it the sheet anchor of the constitutional system. Therefore, it has been said justly that “In India the position of the judiciary is somewhere between the Courts in England and the United States.” Nevertheless, the scope of judicial review in India, though limited, is wide enough to enable the Supreme Court to become one of the most powerful influences on the evolution of the

**Constitution.** The saying that “we are under the Constitution but the Constitution is what the Supreme Court says what is” applies to India also in view of the fact that “As the final interpreter of the Constitution whether in the sphere of fundamental rights or in respect of questions arising between the Union and the States and of the whole body of statute and customary law in the country, the influence of the Supreme Court in the process of moulding the nation in the social and economic sphere cannot be exaggerated.”

**10. Q.** *How far do the provisions of the Constitution relating to the Supreme Court and the High Courts ensure judicial independence ?*

**Ans.** “In determining a nation’s rank in political civilisation, no test is more decisive than the degree in which justice, as defined by the law, is actually realised in its judicial administration, both as between one private citizen and another, and as between private citizens and members of the government.” This remark of Sidgwick expresses what may be called almost an axiom of democratic government. Indeed from the democratic point an independent judiciary dispensing justice even-handedly without fear or favour is so important that this alone may be used as the criterion for measuring the democratic character and excellence of a State. Thus it is not all unimportant to see what steps the Indian Constitution takes for securing this independence of the judiciary. The provisions relevant from this point of view may be described as follows :

1. Every judge of the Supreme Court is to be

appointed by the President of India after consultation with such of the judges of the Supreme Court and the High Courts of the States as the President may deem necessary for the purpose. But in appointing a judge other than the Chief Justice, consultation with the Chief Justice is obligatory. The mode of appointment is such as to secure the formal appointment by the executive but with an important say in the matter given to the judiciary itself, a step which is helpful in securing an independent judiciary.

2. To become a judge of the Supreme Court, a person must be a citizen of India, and either a distinguished jurist, or a High Court judge for five years or an advocate of a High Court for at least ten years.

The Constitution does not fix any minimum age for appointment to the Supreme Court nor is there any fixed period of office. A judge of the Supreme Court will be in office till he has reached the age of 65 years or till he has resigned, or till he is removed from office by impeachment on the ground of either physical or mental infirmity or misbehaviour.

3. The Constitution lays down that no judge of the Supreme Court can be removed from office except by impeachment. An impeachment will involve a joint address by both Houses of Parliament supported by a majority of the total membership and a majority of not less than two thirds of the members present and voting in each House. An impeachment is possible only on two grounds, either proved misbehaviour or incapacity physical or mental. This is similar to the rule in England which also provides that judges hold office

during good behaviour and can be removed only on a joint address of the two Houses of Parliament.

4. The Constitution itself fixes the salaries of the judges and though leaves the question of allowances, leaves and pension to be determined by Parliament, yet expressly states that neither the privileges nor the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment."

5. The Constitution provides that administrative expenses of the Supreme Court, the salaries and allowances etc. of the Judges as well as of the staff of the Supreme Court shall not be subject to vote in Parliament.

6. The Constitution forbids the discussion of the conduct of a Judge of a Supreme Court or of a High Court in Parliament except in connection with preparing an address for the purpose of an impeachment.

7. The Constitution also lays down that a Judge of the Supreme Court, after retirement, is debarred from pleading or acting in any Court or before any authority within the territory of India.

As regards the High Courts also, similar provisions are found. All High Court Judges are appointed by the President in consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court in appointing other judges. Judges of the High Court hold office up to the age of 62 years but may leave the office through resignation submitted to the President, through appointment to the Supreme Court or through impeachment. Their salary, allowances,

and rights as regards leave, pension, and other conditions of service are to be determined by Parliament, which, however, cannot be varied to their disadvantage during their term of office. The Constitution debars any person who has held office as a permanent Judge of a High Court from, after retirement, pleading before any authority in India except the Supreme Court and the other High Courts. Also, no Judge of the High Court can be removed from office except through impeachment on grounds of proved misbehaviour and incapacity ; the expenditure involved in the salaries and allowances of the High Court Judges are charged on the consolidated fund of the State, etc.

Though these steps taken by the Constitution for ensuring the independence of the judiciary are important and achieve their aim to a great extent, yet there are certain lacunae which must be mentioned. First, there is the unfortunate provision of the Constitution to the effect that the President will have the authority to reduce the salaries and allowances of the Judges during an emergency. Secondly, the executive, it is seen, often calls upon retired judges to perform highly important political functions which strangely has not been prohibited by the Constitution. Yet "it is clearly undesirable that the Supreme Court Judges ( and of the High Courts also ) should look forward to other Government employment after retirement..... the practice has a tendency to affect the independence of the judges and should be discontinued." Moreover, it must be seen that independence of the judiciary is not simply a matter of the formal legal or constitutional



provisions, it also depends to a great extent upon the conduct and spirit of the other two branches of government, particularly of the executive. In this light, certain points made by the Law Commission of India deserve special notice. First, the Commission draws attention to a wide-spread feeling "that communal and regional considerations have prevailed in making the selection of the judges...What perhaps is still more to be regretted is the general impression that now and then executive influence exerted from the highest quarters has been responsible for some appointments to the Bench." Secondly, "Communalism, regionalism and political patronage have in a considerable measure influenced appointments to the High Court Judiciary. Apart from this disquieting feature, the prevalence of canvassing for judgeship is also a distressing feature." Thirdly, "The person recommended by the Chief Minister may be, and occasionally is, selected in preference to the person recommended by the Chief Justice. He may be put in the position of having to carry on the work of the Court with Judges, who are incapable of rendering proper assistance or otherwise unsuitable."

In view of these undoubtedly grave defects, the Law Commission has also made some recommendations which may be put thus. As regards the Supreme Court, efforts should be made to recruit the judges of the Supreme Court directly from among distinguished members of the Bar, with a tenure of at least ten years. The practice of appointing the senior most puisne judge of the court as the Chief Justice of India is not

desirable because the duties of the latter require not only a person of ability and experience but also a competent administrator capable of handling complex matters. Merit should be the sole criterion in appointing Judges and for the purpose of recruitment, the entire country should be treated as one unit. An *ad hoc* body presided over by the Chief Justice of India should be created to draw up a panel of persons for such appointment. The meagre pensions which at present judges get do not induce members of the Bar to accept judgeship in the Supreme Court. The Commission made similar recommendation about the High Courts too including the recommendation to raise "the permanent strength of the High Courts in view of the recent increase in their work", to increase "the number of working days in a year and the working hours of a day to at least 200 and five respectively and the creation of a Central Ministry of Justice to promote effective co-ordination between the judicial systems obtaining in the various States and ensure that the High Courts possess adequate and competent personnel."

11. Q. *Describe the nature and scope of amendments made so far in the Constitution of India.*

Ans. Since the inception on January 26, 1950, the Constitution of India has been amended for a total of seventeen times so far. These may be briefly described thus.

The First Amendment, 1951, was mainly introduced for removing certain practical difficulties experienced in the working of some fundamental rights, particularly

those of equality before law, freedom of speech, and the right to property. It amended Articles 15, 19, 31, 85, 87, 174, 176, 341, 342, 372 and 376. It also added a new Schedule, the ninth one, to the Constitution.

The Second Amendment, 1952, amended Article 81. Originally, it was provided that at least one member was to be elected to the Lok Sabha for 750,000 of the population and, the total membership of the Lok Sabha should not exceed 500. But the growing size of the population soon made it difficult for these two limits to be obeyed and hence they were removed.

The Third Amendment, 1951, enlarged the scope of the Union's legislative power by introducing changes in the Seventh Schedule consisting of the three legislative lists. It was done through a transfer of some items from the State List to the Concurrent List.

The Fourth Amendment, 1955, introduced certain limitations on the right to property by making changes in Articles 31 and 31A, 305 and the Ninth Schedule. The most important result of the amendment was that henceforth no law taking over private property by the State could be nullified on the ground of adequate compensation not being paid.

The Fifth Amendment, 1955, amended Article 3 and introduced changes in the method of ascertaining the will of a State legislature regarding territorial or boundary changes affecting it.

The Sixth Amendment, 1956, introduced changes in the Union List and the State List (Seventh Schedule) in order to enable the Union to impose tax on inter-State Commerce.

The Seventh Amendment, 1956, was primarily concerned with the reorganisation of States and naturally had consequential effects on many parts of the Constitution. Among the parts so affected, special mention may be made of the First and the Fourth Schedules.

The Eighth Amendment, 1960, amended Article 334 to further extend the period of reservation of seats in legislatures for Scheduled Castes and Scheduled Tribes by another ten years. It also granted a similar extension for the same period to the provision for the representation of the Anglo-Indian Community by nomination in the legislatures, Union and State.

The Ninth Amendment, 1960 amends the First Schedule to the Constitution for giving to the Union Government the necessary power to transfer certain territories to Pakistan as a part of a comprehensive agreement on the settlement of border disputes.

The Tenth Amendment, 1961, gave the status of Union Territory to Dadra and Nagar Haveli which were then free from Portuguese control and included into India.

The Eleventh Amendment, 1961, amended Articles 66 and 71. The former was changed so as to provide that for the purpose of the election of the Vice-President, the two Houses of Parliament need not meet jointly to form the electoral college, as required originally. And the latter was changed so as to provide that the election of the President or the Vice-President shall not be challenged on the ground of any vacancy for whatever reason in the appropriate electoral college.

The Twelfth Amendment, 1962, integrated Goa,

**Daman and Diu, freed from Portugese rule, by giving them the status of Union Territory.**

The Thirteenth Amendment, 1962, came as a complementary part of the State of Nagaland Act, 1962 and provided for certain necessary administrative arrangements in the State of Nagaland. "According to these, notwithstanding anything in the Constitution, no Act of Parliament in respect of religious or social practices of the Nagas, Naga customary law and procedure, administration of civil and criminal justice involving decisions according to Naga customary law, and ownership and transfer of land and its resources, shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland by a resolution so decides. The Amendment provides also for the vesting of certain special responsibilities in the Governor of Nagaland."

The Fourteenth Amendment, 1962, provided for a number of changes. First, it increased the number of representatives to Parliament from Union Territories from 20 to 25 ; secondly, by inserting a new Article 239 A, it provided for the creation by Parliament of local legislatures or Council of Ministers or both in some Union Territories, and thirdly, it provided for the incorporation of the former French Establishments in India, under the name Pondicherry, as an integral part of the territory of the Indian Union.

The Fifteenth Amendment, 1963, changed the retirement age of High Court judges from 60 to 62, provided for re-appointment of retired judges under special circumstances and also provided for certain special procedures for dismissal, etc. of civil servants.

The Sixteenth Amendment, 1963, was made with a view to strengthening national intergation and provided that the Government can impose necessary restrictions on freedom in the interest of the sovereignty and integrity of India and also required every member of the Union Parliament and of the State Legislatures to take an oath of allegiance to the Indian Constitution and for maintaining intact the sovereignty and integrity of India.

The Seventeenth Ammendment, 1964, has the purpose of removing the legal barriers in the way of land reforms. This it does in two ways, first, by providing for retrospective effect of the amendment from the day of inauguration of the Constitution, and secondly, by amending the Ninth Schedule of the Constitution so as "to include therein 44 State enactments relating to land reform in order to remove any uncertainty or doubt that may arise in regard to their validity."

Now, the fact of seventeen amendments in nearly as many years has sometimes been attacked as a sign of weakness in the Constitution. Some critics contend that so frequent changes made so easily can only result in an erosion of popular respect for the basic law of the country. Without denying an element of truth in the criticism, it must be said that a close examination is bound to show much of the criticism to be misplaced. In this connection, two important points may be made.

First, every Constitution requires to be adjusted to the march of events and this adjustment may be

made through formal amendment or through informal change, by way of judicial interpretation, for example. As is found in the U. S. A., the procedure of amendment is notoriously rigid and, therefore, in the development of the Constitution, the main part has been played by judicial interpretation. But here in our country, instead of leaving the matter to the rather slow machinery of judicial interpretation, our Constitution has vested the power in the representatives of the people and this naturally results in formal amendment whenever necessary.

Secondly, it is clear that the changes made by the amendments could not have been made by the Courts under our system. Some amendments came as a natural sequel to the evolution of the Constitution, others came in response to practical necessity. For example, the reorganisation of States and the consequent constitutional changes could not clearly have been adequately dealt with except through amendment of the Constitution.

To conclude, that many amendments have been made or have been found to be necessary, need not necessarily be interpreted as a sign of weakness or instability in the constitutional system or government in India. The point is, however difficult the formal procedure may be, the Constitution can be changed as easily and as often as the dominant majority in society wish, in spirit at least, if not in form. Thus the real point on which attention should be concentrated is that whether and how far the changes that have been made so far contribute to the strengthening of really

responsible government in the country which again is clearly a matter not so much of law or the Constitution as of politics in the broad sense of the term.

12. Q. *Discuss the scope and extent of judicial review of Parliamentary Privilege in India.*

Ans. It is no secret that the Constitution of India has borrowed heavily from the British Constitution. But perhaps the only direct reference to the British House of Commons is to be found in Article 105 dealing with the powers, privileges, and immunities of the Houses of Parliament, their members and Committees. "It guarantees to every member freedom of speech in Parliament and grants immunity from proceedings in any Court of law in respect of anything said or any vote given by him in Parliament or in any of its Committees. A similar immunity is granted in respect of any publication, under the authority of either House of Parliament, of reports, papers, votes or proceedings." And the Constitution says that "In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the Committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and Committees, at the commencement of this Constitution." It may be said in this connection that the Constitution makes the same provision as regards the privileges and immunities of the State Legislatures and their members and Committees.

Now, let us look at the privileges and immunities of



the British House of Commons, its members and Committees. Briefly, these may be described as follows. In the House of Commons, at the beginning of each session since about the middle of the sixteenth century, the Speaker has claimed, on behalf of the Commons, "their ancient and undoubted rights." These include freedom from arrest during sessions of Parliament and for forty days before or after a session, (not for a criminal offence or for contempt of court), freedom of speech in debate, and the right of access to the Crown which is a collective privilege of the House and exercised on behalf of the House by the Speaker. Further privileges, rarely exercised, are to debate in secret, the right to control internal proceedings, and the right to pronounce upon legal disqualifications for membership and to declare a seat vacant on that ground. But perhaps the most important right of the House of Commons is "an arbitrary power of committal for contempt which cannot be enquired into by the Courts, provided that the cause of contempt is not stated." And "Any act or omission which obstructs or impedes either House of Parliament in the performance of its functions or which obstructs or impedes any member or officer of such House in the discharge of his duty or which has the tendency, directly or indirectly, to produce such results may be treated as a contempt, even though there is no precedent of the offence."

The main question concerning the Parliamentary Privileges is whether these are unfettered or subject to certain limits, judicial and otherwise. Broadly, there are two views which may be discussed as follows.

First, it is said that on the authority of the Constitution itself, the Legislatures in India are competent, like the House of Commons of Britain, to determine its privileges, and immunities, to determine what constitutes contempt as well as what constitutes adequate punishment for contempt and naturally, therefore, a warrant issued by a Legislature for punishment of a person for contempt cannot be questioned by any Court.

Secondly, it is said that the privileges and the immunities of the Legislatures in India are limited neither by fundamental rights nor by judicial scrutiny. It is said that it is necessary for the Legislatures to have the power to punish any body including a judge for contempt, for, otherwise the high prestige of the legislative organ cannot be maintained.

Thirdly, it is said that the fact that no judicial action can be taken for what is said in the Legislature also shows the freedom of the Legislatures from judicial interference in this respect.

And those who would like to put some limits to the privileges and immunities of the Legislatures put their case thus. First, it is pointed out that the whole of the powers and privileges, etc. of the British House of Commons cannot logically apply in the case of the Legislatures in India because the House of Commons enjoy some privileges in relation to the Crown which are clearly inapplicable in India. Thus the declaration of the Constitution in this regard must be taken to mean that only certain privileges of the Commons apply here and those that apply must not conflict with other parts of the Constitution. Secondly, it is said that

whereas in Bratain, Parliament is really sovereign, in India the system is different, there being a written, federal Constitution. A written federal Constitution must inevitably imply some limitations on Legislatures on all levels and also there must be a system of judicial review. Thirdly, it is said that, that the power of the Legislatures in India is not limitless is shown by the fact that they cannot discuss the conduct of any judge in the discharge of his duties. And, finally, attention is drawn to the existence of certain fundamental rights and it is said that the Constitution guarantees an absolute right to obtain relief against invasion of a fundamental right. There is no constitutional provision making an exception in this regard with reference to the privileges and immunities of the Legislatures. All this means the privileges and immunities of the Legislatures are limited by the fundamental rights and therefore, subject to judicial scrutiny because it is the business of the Courts to protect the fundamental rights.

Let us now turn our attention to the attitude taken by the judiciary to this question of Parliamentary Privilege. In *Sharma V. Sri Krishna* (1958), the Supreme Court held that "the right to freedom of speech was subject to the right or privilege of the Legislature to prohibit that publication of even a true and faithful report of the proceedings that took place in the House. According to the Court the real remedy lie only with the Legislature itself by passing a comprehensive law defining and codifying its privileges." When such a codification takes place, then the privileges will be

limited by the fundamental rights. But so long as that does not take place, the limit of the fundamental rights in this regard will not apply. The ground for such an opinion was stated to be that the provisions of the Constitution dealing with the fundamental rights are general provisions but those dealing with the privileges and immunities of the Legislatures are special provisions and naturally the special provisions should have primacy over the general ones. The same opinion was reaffirmed by the Supreme Court when the Editor of Blitz, a Bombay Weekly, had moved the Court for protection on the ground of fundamental right against the warrant of the Lok Sabha summoning him before the Bar of the House. And finally as regards the case of jurisdictional conflict between the U. P. Assembly and the Allahabad High Court, the Supreme Court to which the matter was referred by the President for advice under Article 113, said in a majority opinion that "The Constitution of this provision (Article 191 (3) of the Constitution) must ultimately rest exclusively with the Courts which must determine its scope and content. In construing the Article the Courts must have regard to the other provisions of the Constitution bearing on the same subject." Thus, the Supreme Court held, even when the Legislature issues a general warrant for committal, the jurisdiction of the courts is not negated thereby because the Constitution provides an absolute right to obtain relief against invasion of a fundamental right, there being no exception made in this respect in favour of the Legislature.

Thus the question of the powers, privileges and

immunities of the Legislature is ultimately a question of limits, which can be of two kinds, one provided by judicial scrutiny and the other by the constitutionally guaranteed fundamental rights. In Britain where there is no provision of fundamental rights, the position of Parliamentary Privileges vis-a-vis the Courts may be described thus : "parliamentary privilege can be defined as that law for the Member of Parliament which is no law for the electorate. But it is law...It is for the ordinary courts to decide whether or no the privilege claimed exists and what its limits are, although it is true that in neither case will they enquire into the mode of user of an admitted ..privilege ..for many years the House of Commons claimed and in the opinion of some, still claims, the right to determine not merely the breach of an admitted privilege but also whether or not the privilege in question exists. The better opinion to-day is, however, that it is for the courts alone to determine questions relating to the existence and extent of parliamentary privilege."

To conclude, "It would be desirable that both Parliament and State Legislatures should define by legislation the precise powers, privileges and immunities which they possess in regard to contempt and the procedure for enforcing them." But on the whole issue of the nature and extent of these privileges and immunities, what has been said in Britain may also be said here, that is,—"The original reason for the existence of the privileges, that is, to protect the High Court of Parliament, has basically disappeared, for, except where the House of Lords

acts as a final court of appeal, the real functions of Parliament are now those of debate and legislation. It cannot any longer be the case that all the existing privileges are necessary to protect members in the discharge of their duties. In particular it may be argued that the power to punish should be transferred from the Houses themselves to the Courts of Law, so that the Houses may no longer seem to be judges in their own cause...Diverse activities of individuals outside the House may be held by the House to amount to contempt and the Courts of Law are powerless to decide otherwise." Therefore, let us have Parliamentary Privileges, but do not let us make a fetish out of the idea so that the idea may be used to stifle all freedom of speech, criticism, etc., which are rightly regarded as some important elements of a democratic system.

13. Q. *Can the boundary of a State in India be changed to-day without amendment of the Constitution? Can any part of the territory of India be given away to a foreign State without the consent of (a) people of the territory concerned, and (b) Parliament?*

Ans. It is well known that the Indian Constitution creates a federal system which in many important respects departs from a typical federation like, say, the U. S. A. A very important example of such deviation from the usually accepted model is provided by the fact that the Indian Constitution creates an indestructible union but unlike in the U. S. A., this indestructible Union does not consist of indestructible States; the

former because the Constitution does not allow the States any right to secede from the Union, and, the latter, because, unlike in the U. S. A., the Union has the power to redraw the map of the country without consulting the States.

Thus Article 2 of the Constitution empowers the "Parliament of India to admit into the Union, or establish, new States on terms and conditions it thinks fit. Article 3 says, Parliament may by law (a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State ; (b) increase the area of any State ; (c) diminish the area of any State ; (d) alter the boundaries of any State ; (e) alter the name of any State." This is a matter on which Parliament enjoys exclusive power but nevertheless, presumably for political reasons, the Constitution has provided a procedure which allows the legislatures of the States concerned to air their opinion in the matter. The Constitution provides that any Bill seeking to make any of the above mentioned changes can be introduced in Parliament only with the recommendation of the President and "after prior reference by the President to the legislature or legislatures of the State or States concerned for its or their opinion." Although the opinion of the State is not constitutionally binding upon Parliament, yet this procedure of Presidential reference "helps Parliament to have in view the sentiment of the people concerned before taking a final decision." Any such change made by Parliament—changes which include that in the First Schedule and in the arrangements

relating to representation in Parliament and State legislature—will of course amount to change in the Constitution but such a change will not be regarded as an amendment and may thus be brought about by the ordinary process of law-making ( Art. 4 ). Therefore, we may say that the Indian Constitution empowers Parliament to reorganise the States and alter their boundaries in any way it thinks fit without taking the consent of the legislatures concerned and without taking recourse to constitutional amendment.

This provision of the Indian Constitution really makes it a unique federation. For example, we find Article iv, 53 (2) of the Constitution of the U. S. A. declaring "...no new State shall be formed or erected within the jurisdiction of any other State ; nor any State be formed <sup>1</sup>, the junction of two or more States or parts of States without the consent of the Legislature of the States concerned as well as of the Congress." In Australia, too, the boundaries of the States cannot be altered without their consent, there being also the provision of referendum in the State or States concerned on such a question. Article 18 of the Soviet Constitution declares "The territory of a Union Republic may not be altered without its consent." Of course, it does not follow that India also will have to do what these States have done, India may do something different under different circumstances but it must be recognised that in this respect the danger is "while a rearrangement of Indian territory based on linguistic and economic consideration might well be advantageous, a projected rearrangement for purely political reasons might raise the



question whether the Constitution protected State rights.”

In this connection, another question is raised, namely, while Parliament undoubtedly has constitutional authority to redraw the political map of the country by whatever adjustments it likes to make in the boundaries of the State, does the same provision of the Constitution also empower to cede a part of the territory of the country to a foreign country? This question arose out of the controversy relating to the transfer of Berubari Union of West Bengal to Pakistan. The transfer was to be “in exchange for Pakistani territory in pursuance of the agreement between the Governments of India and Pakistan in 1958.” “This question came up for detailed examination by the Supreme Court on a reference made to it by the President in 1960.” The Court held “Broadly stated, it (Article 3 of the Indian Constitution) deals with the internal adjustment *inter se* of the territories of the constituent States of India...We feel no hesitation in holding that the power to cede national territory cannot be read into Article 3 (c) by implication.” “The implementation could only be effected by an amendment of the Constitution under 368. Subsequently the Constitution (Ninth Amendment) Act, 1960 was passed to give effect to the transfer of the territory concerned.”

But here the important point to note is that Parliament can cede a part of the territory of a State to a foreign State through constitutional amendment but without the consent of the State concerned. In the U. S. A., however, it is not possible to do so without the consent of the State concerned.

**Q.** *Discuss, with special reference to England, the true nature of Constitutional Law.*

**Ans.** To give a precise definition of Constitutional Law is not a very easy job. For example, Prof. Jennings defines it thus : Constitutional Law is the law of the Constitution, the fundamental law which determines these authorities ( legislative, executive and judicial ) and the general powers which they exercise.” But the meaning of Constitutional Law thus defined is not clear unless we know what Constitution means.

The word Constitution is used in two different senses. In one sense, it refers to the body of the basic laws laying down the organisation of the government and governing the relation between the different parts of the government as well as between the government and the governed. Usually, there is a single document containing the collection of all such fundamental laws and in this sense, the Constitution becomes something tangible. In another sense, the word Constitution is used to cover the totality of all laws and rules, written and unwritten, regulating the life of government in a country. In this sense, Constitution includes not only those rules and laws which the courts recognise and apply, but also the customs, usages, conventions and traditions, which, though not recognised and applied by the courts, play a not negligible role in the political life. In fact they greatly influence and modify both the form and content of formal law which really cannot be understood in isolation from them.

Clearly, in the former case, it is rather easy to understand\* that there is a fundamental distinction

between Constitutional Law and the rest of the law. It is the law of the written Constitution. It deals, therefore, with the selection of legal rules set out in the document and with their meaning and application." In this case, our concern from the point of view of Constitutional Law is only with "the rules in the Constitution", and not "with the rules made under it." But the problem is that in this sense there is no British Constitution, it being a complex amalgam of institutions, principles and practices; a composite of charters and statutes, of judicial decisions, of common law precedents, usages and traditions; not one document but hundreds of them;...not derived from one source but from several, not a completed thing but a process of growth" This characteristic of the British Constitution which makes it a Constitution in the second sense of the word, also makes the nature of British Constitutional Law correspondingly involved and complex. Before we explain the nature of British Constitutional Law, we may define it thus, in the words of Professors Wade and Phillips, "...it means the rules which regulate the structure of the Principal organs of government, and their relationship to each other, and determine their principal functions. These rules consist both of legal rules in the strict sense and of usages, commonly called conventions, which without being enacted, are accepted as binding by all who are concerned in government... Though the constitutional lawyer is concerned primarily with the legal aspects of government, there is required for an understanding of Constitutional Law some knowledge of the chief features of constitutional history

and of the working of our political institutions. The constitutional lawyer should also be conversant with the relationship between the citizen and the State, and more particularly with what may be called political relationship rather than economic relationship."

In England, there is no written Constitution but, "there are four kinds of rules in England which would be inserted in a written constitution. They are : 1. Legislation ; 2. Case law, or law deduced from judicial decisions ; 3. "The law and custom of Parliament."; 4. Constitutional conventions."

In England, legislation which deals with what may be called constitutional matters does not differ in form from legislation dealing with what may be called the rest of the law. "The scope of the law is practically unlimited for it must cover all aspects of the relationship between the individuals and authorities throughout the country. Thus it is inevitable that there should be legal rules concerning crime, matrimonial relationships, real and personal property, conveyancing, wills, sale, civil wrongs, the status of companies, aeronautics, and the control of health, to mention but a few topics. Obviously all these laws are not a part of Constitutional Law but in England all these are "passed by Parliament in the same way, and expressed in the same way."

Again, "It is only rarely that a court of law expresses any opinion on the distinction (between constitutional law and ordinary law) for provided the court is able to deduce the law applicable in a given case, it is not often concerned to declare which branch of the United Kingdom law it may belong to in comparison with

other branches." Thus it is that case law also does not differ in form from legislation. "Consequently this part of Constitutional Law may be said to be part of the ordinary law of the land."

As regards "the law and custom of Parliament as the very phrase makes it clear, some of them are to be found in statutes while some others are "outside the jurisdiction of the ordinary courts . . . It is not by legislation or case law, for instance, that a Bill is read three times in each House. Provided that an Act is passed by the Queen with the advice and consent of the Lords and Commons in Parliament assembled and by authority of the same, the courts are not concerned to ask by what process the two Houses passed it."

As regards the constitutional conventions, the first point to be noted is that here is a contradiction in terms. "Conventions are mentioned separately because they are not laws, and the courts are therefore not bound to enforce them. They certainly do not amount to law, but they are regarded as being of so fundamental a nature that it would be unthinkable that anyone should transgress them."

Thus from the fact that Constitutional Law in England deals with rules derived from four different sources of which only two form part of the ordinary law of the land, derives an important point, namely, "Constitutional Law has a double connotation in England. Sometimes it means the rules which would be incorporated in a written Constitution if we had one ; sometimes it means only the legislation and case law relating to the Constitution." The question naturally is which

one of the two meanings is more acceptable and it can be shown that the former is because any definition of Constitutional Law in England which leaves the conventions out of account can provide only "a strange notion of the Constitution," Dicey notwithstanding.

Dicey was of the opinion that Constitutional Law has no direct concern with the conventions because "They vary from generation to generation, almost from year to year." Dicey made a distinction between the conventions of the Constitution and the law of the Constitution, making the latter alone the true concern of Constitutional Law. But the opinion of Dicey cannot be accepted because "it is singular Constitutional Law which mentions the Cabinet because it is referred to in the Ministers of the Crown Act, 1937, but cannot say what it does ; which knows of the Prime Minister because he is three times mentioned in statutes, but can say of him only that he has no powers whatever, . . . and which distinguishes a minister from a civil servant by the statement that the latter is and the former is not within the terms of the Superannuation Acts." In other words, even though "the rules of law are usually more precise than constitutional conventions," and the former "can be found set out clearly in legislation or may be inferred, as to their major principles, from the decisions of courts", yet the constitutional conventions are "rules whose nature does not differ fundamentally from that of the positive law of England."

To conclude, "United Kingdom Constitutional Law comprises all those laws, derived from the various sources referred to above, which are fundamental to the

organisation of the State, together with such lesser rules as are laid down to facilitate the working of this organisation, but it also includes a certain element of pure convention."

**Q.** *"In the context of modern developments, the Rule of Law is an exploded myth."* Discuss.

**Ans.** The Rule of Law is generally accepted to be a fundamental principle of the British Constitution. "This has never been enacted as a statute, but is implicit in a long line of parliamentary measures and judicial decisions and well grounded in Common Law. As defined by an English jurist, the Rule of Law means the supremacy or dominance of Law, as distinguished from mere arbitrariness, or from some alternative mode, which is not law, determining or disposing of the rights of individuals." In other words, it means that "all actions of government must conform to the law and an individual cannot be prejudiced in person or property by the government or anyone else except in accordance with existing law." It also is taken to mean that "officials have to justify their actions by the law generally applicable to all citizens before the established judiciary, which is free of all suggestions of executive interference."

Now under modern conditions, it is said, several developments have taken place which render the idea of rule of law no more than a myth. Before, however, we make up our mind on the point, we should go back to Dicey who was the first modern thinker to give us a clear formulation of the idea and to present it as a basic principle of the British constitutional life. Thus

an examination of the case as put by Dicey, however briefly, seems in order.

According to Dicey, the concept of the Rule of Law had three aspects. First, it means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. In England, men are ruled by the law and by the law alone ; a man may with us be punished for a breach of the law but he can be punished for nothing else." Second, it means equality before the law, or equal subjection of all classes to the ordinary law of the land administered by the ordinary law Courts ; the 'Rule of Law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals ; there can be with us nothing really corresponding to the 'administrative law' or the 'administrative tribunals' of France. Third, " 'The Rule of Law' may be used as a formula for expressing the fact that with us the law of the Constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts ; that, in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants ; thus the Constitution is the result of the ordinary law of the land."

This exposition of the concept of Rule of Law has



been subjected to various criticisms some of the more important of which may be discussed in this way.

1. Dicey means that the common law does not recognise that the government has a "police power" by virtue of which it may act in a general way for the preservation of public peace or safety. The point that he wants to make is that "powers whatever their extent must be exercised in accordance with the ordinary common law principles which govern the relationships of one Englishman to another." Two examples may be given, the case of *Entick v. Carrington* and the case of *Wolfe Tone*, in both of which the decision was that "With respect to the argument of State necessity or a distinction that has been aimed at between State offences and others, the common law does not understand that kind of reasoning, nor do our books take note of any such distinction."

"Two criticisms have, however, been made of this aspect of Dicey's definition. First, it is said that it is difficult to distinguish between regular law and arbitrary power. If the law gives the power, how can it be arbitrary or irregular?" But the difficulty may be seen to be not as great as it seems if the idea of rule of law is taken to mean not a legal principle but "only a constitutional principle based upon the practice of liberal democracies of Western World. In this sense the doctrine is still perfectly true to-day. Everyone, high or low, must be prepared to justify his acts by a reference to some statutory or common law power which authorises him to act precisely in the way in which he claims he

can act. Superior orders or State necessity are no defence to an action otherwise illegal."

Secondly, it is said that if Rule of Law "excludes the existence even of wide discretionary authority on the part of the government," then Rule of Law does not exist to-day, indeed cannot exist under modern conditions. "Modern government, as is well known, cannot be carried on at all without a host of wide discretionary powers, which are granted to the executive by the large number of statutes annually passed by Parliament." This criticism of Dicey while perfectly fair is moderated somewhat in its force by the fact that Dicey, an old fashioned whig, was writing in "a period when the *laissez-faire* State of the Victorians was only just beginning to give way to the welfare State of the modern world" a fact which explains his inability to foresee "the extent to which statutory powers of government would change the nature of English Constitutional Law." Thus to-day when the necessity and indeed the inevitability of a large amount of discretionary powers in the hands of the government is accepted on all hands, Dicey becomes definitely in the wrong in suggesting that such "powers are in some way undesirable or unnecessary."

No body, however, has sought to criticise the last sentence, in which Dicey said that "a man may with us be punished for a breach of the law but he can be punished for nothing else." The value of the principle may be seen in the formulation of Jennings who puts the meaning of the Rule of Law in this field as follows: "First, it means that the category of

crimes should be determined by general rules of a more or less fixed character. Secondly, it implies that a person should not be punished except for a crime which falls within these general rules....Thirdly, it may mean that penal statutes should be strictly construed, so that no act may be made criminal which is not clearly covered by the statutes. Fourthly, it may mean that penal laws should never have retrospective effect."

2. Dicey's definition of the second aspect of the Rule of Law "is still perfectly true in the sense that the social or political or economic status of an individual is by itself no answer to legal proceedings, civil or criminal. For example, in 1950, the Lord Lieutenant of Lancashire, Earl Peel, was prosecuted at the Lancashire Assizes and fined £ 25,000 for breach of the building regulations in force at the time....A similar prosecution for infringement of the building regulations was brought against the Yorkshire Electricity Board in 1951 ..its chairman was sent to prison for six months and the Board itself fined £ 20,000."

This aspect of Dicey's definition may be a good target of criticism if it is taken to mean that officials have the same rights and duties as citizens. But Dicey's meaning may be put thus,—“all are equally subject to the law, though the law as to which some are subject may be different from the law to which others are subject.” “In other words, however great the powers or the duties conferred upon the executive, all are equally responsible before the ordinary courts for the exercise of their powers, rights and duties.”

But Dicey's assertion that the rule of law precludes anything corresponding to the administrative law of France, is more open to criticism and rightly so. "It is clear to us to-day that Dicey misunderstood the nature and functions of French administrative law and especially the function of the Conseil d'etat, the Chief Court in the administrative hierarchy. The mere fact that French officials are exempt from process in the ordinary Civil Courts does not necessarily mean that they are legally irresponsible." The Crown and public authorities enjoying certain privileges and immunities in litigation, Foreign Sovereigns, their ambassadors and the staffs and families of those ambassadors enjoying immunity from process in the ordinary courts; trade Unions enjoying, by virtue of the Trade Disputes Act, 1906, complete immunity from actions in tort, whether or not the matter arises out of a trade dispute, etc. are some of the examples of more important exceptions to the principle of equality before the law.

3. Dicey, in looking upon "such general principles of the Constitution as the rights of free speech and public meeting" as "derived from the decisions of the Courts in ordinary private law questions", clearly emphasises the basic common law freedoms of liberty, speech and property but it is clear that "it does not include the statutory rights to pensions, sickness benefit, free education, the right to vote and so on. Yet many would think that the statutory rights conferred on the citizen by the welfare State are as important as the common law principles which he had in mind."

To conclude, to say that under modern conditions

**Rule of Law** is an exploded myth is going too far. What has really happened is that the idea has inevitably undergone a certain change in meaning and emphasis. But that the basic idea remains is shown by the definition adopted by the New Delhi Conference of 1959 in which participated "185 judges, practising lawyers and teachers of law under the sponsorship of the International Commission of Jurists with the object of discussing freely and frankly the Rule of Law and the administration of justice throughout the world." Its definition runs : "The principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man." It is also to be noted that this Conference "emphasised that the Rule of Law must make for the establishment of social, economic and cultural conditions which permit men to live in dignity and to fulfil their legitimate aspirations." Thus the idea remains, its interpretation changes naturally with changing circumstances, the meaning becomes both broadened and deepened.

**Q.** *Define and classify Prerogatives of the British Crown. What is the position of the Courts in relation to them ?*

**Ans.** Dicey defined the term prerogative thus : "The prerogative appears to be both historically and as a matter of actual fact nothing else than the residue

of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown." But this definition is considered by many to be not quite satisfactory because it does not "bring out clearly the fact that prerogative, like parliamentary privilege, is part of the common law." Such people prefer Blackstone's definition which runs thus: "By the word prerogative, we usually understand that special pre-eminence, which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. And hence it rollows, that it must be in its nature singular and eccentric; that it can only be applied to those rights and capacities which the King enjoys alone, in contradistinction to others and not to those which he enjoys in common with any of his subjects; for if once any one prerogative of the Crown could be held in common with the subject, it would cease to be prerogative any longer. And therefore.....t<sup>1</sup> prerogative is that law in the case of the King, which is law in no case of the subject."

The existing prerogatives of the Crown may be broadly divided into those affecting the person of the monarch or the status of the Crown and those of wider implication. The second class again may be divided into those of legislative, executive and judicial nature. The prerogatives affecting the person of the monarch or the status of the Crown are exemplified by the monarch's personal immunity from legal action, by the fact of the monarch not being "affected by the general law concerning the disability of infancy," by the fact that "the Crown is only to be affected by the passage of

a statute if that statute concerns it expressly or must do so by necessary implication," by the fact that "on the death of one monarch his successor immediately takes office."

Of the legislative prerogatives, the examples are the power of the monarch to summon, prorogue and dissolve Parliament, to give Royal Assent to legislation, to legislate by Order in Council or by Proclamation, etc. About the prerogatives of an executive nature, perhaps the best account comes from the pen of Bagehot who says "I said in this book that it would very much surprise people if they were really told how many things the Queen could do without consulting Parliament. Not to mention other things, she could disband the army ; she could dismiss all the officers from the General Commanding-in-chief downwards ; she could dismiss all the sailors too ; she could sell of all our ships of war and all our naval stores ; she could make a peace by the sacrifice of Cornwall, and begin a war for the conquest of Brittany. She could make every citizen in the United Kingdom, male or female, a peer ; she could make every parish in the United Kingdom a University ; she could dismiss most of the civil servants ; she could pardon all offenders. In a word, the Queen could by prerogative upset all the action of civil government." "A certain defence, known as the defence of 'act of State' may be raised under the Prerogative power." "The defence of the act of State is a complete one."

And as regards prerogatives of a judicial nature, "The Monarch is still technically the fountain of justice, and the fiction still exists that he is present in his own

courts, though the judges resolved as long ago as 1607 that he may not give an opinion on any case. In theory he normally prosecutes, and all writs are in his name. But it should be remembered that the judges of superior Courts no longer hold office at the Monarch's pleasure. Again, the Monarch possesses the Prerogative of mercy, in that convicted persons may be pardoned or reprieved by Royal command, exercised through the Home Secretary."

Now, as to the jurisdiction of the courts in relation to the prerogatives, the following may be said. "...during its history the courts have been faced with problems of the same kind as those which have arisen in the history of parliamentary privilege. The courts have been asked to consider questions as to, first, the existence, and secondly, the mode or manner of user of a prerogative power, and just as in the case of privilege they decided that the courts could enquire into questions relating to the existence but not as to the manner of user of a privilege, so they came to similar conclusions in the case of prerogative." The following cases may be briefly mentioned as establishing these fundamental propositions.

First, the case of *Prohibitions del Roy* ( 1607 ) established that the monarch derives his powers from the law and that the law must be administered in the ordinary courts by a judiciary trained in its peculiar art and technique. It is by the artificial reason and judgement of the law that the kingdom is governed and not by the natural reason of any one person." Second, there is what Coke has called the case of Proclamations



( 1611 ), where the decision was that “the King by his proclamation cannot create any offence which was not an offence before, for then he may alter the law of the land by his proclamation in a high point ; for if he may create an offence, where none is, upon that ensues fine and imprisonment. Also it was resolved, that the King has no prerogative but that which the law of land allows him. But the King for prevention of offences may by proclamation admonish his subjects that they keep the laws and do not offend them.” In other words, “the mere claim of the holder of a power is not conclusive and that it is for the courts to decide on its existence and true extent.” This principle was established in Darnel’s case or the case of the Five Knights ( 1627 ). “After his demand for a forced loan Charles I in 1627 had imprisoned various persons who had refused to contribute. Five of them, Sir Thomas Darnel and four others applied for writs of *habeas corpus* from the court of King’s Bench. ...The Court ..came to the conclusion that the return to the writ was good and the law gave to the King a common law power of imprisonment without giving reasons.”

“The twentieth-century case which reaffirms the principle laid down in Dornel’s case that the courts will not inquire into the mode of user of an admitted prerogative is *Chandler v. D. P. P.* The appellants, members of the committee of 100, had been convicted of conspiracy to commit a breach of Section 1 of the Official Secrets Acts, 1911, namely, to enter a prohibited place for any purpose prejudicial to the safety or interests of the State. ...The House of Lords held that the trial

judge had rightly refused to allow them to call evidence to show that nuclear disarmament would really be beneficial and not prejudicial to the interests of the State. The disposition and armaments of the armed forces was one of the oldest prerogatives of the Crown and its exclusive discretion in such matters could not be challenged in a Court."

Coming to the present position of the prerogatives, we may say that though in theory these are numerous and wide, in fact, however, very few of them are actually exercised by the monarch personally and in his own discretion. And it may also be said that all exist only by leave of Parliament. Also, the term royal prerogative is misleading in that it leads one to believe that the monarch has more real power than is in fact the case.

In short, it must always be kept in mind that "so long as Parliament continues to allow the Monarch or the Crown to retain any prerogatives, then those prerogatives will be pre-eminent but they always could be swept away by Act of Parliament. But since the convention of advice upon which the Monarch acts leads to the placing of considerable extra power in the hands of the Government of the day, it would appear very unlikely that any Government party should wish to sweep them away." Another reason for any Government party being unwilling to sweep them away is that these allow them considerable freedom of action particularly in the field of foreign relations and disposition of the armed forces. "If the conduct of foreign affairs and the disposition of the armed forces of the Crown had not been included within the prerogative, the cabinet might

## Help to the Study of M. A. Political Science

have hesitated in 1956 before embarking on the sweep adventure." Of course, there are examples of Parliament abridging, modifying or replacing such powers by statutory powers, the most notable such example being the passage of the Crown Proceedings Act, 1947.

*Q. Describe the role of the Privy Council in the Government of Britain to-day.*

*Ans.* The Privy Council is a body which hardly gets the limelight to-day but nevertheless it is important for the position it occupies in the whole system of government. Its importance is evident from the fact that "Neither ministry nor Cabinet, nor the role of the Crown in general, can be understood without bringing it into the picture." The origin of this highly important body may be described thus.

"Very early in British constitutional history, the powers of government...began to be differentiated along lines resembling the threefold classification and distinct organs for their exercise emerged. The Great Council, composed of the great feudal lords and meeting three times a year, advised the King largely by trying to set limits to royal action, as in Magna Carta. ....Apart from the Great Council, the King was advised by an inner Council composed of his trusted lieutenants.....This inner Council, generally called the Curia Regis, carried on all the executive work of government, doing the will of the King everywhere except where blocked by the Great Council. Within the Curia Regis itself, increasing size brought the need for a small executive committee—hence

the Privy Council, close to the King. The Privy Council became the real executive Council.....”

At present the Privy Council is composed of 330 members. These members include the archbishops of Canterbury and York, the bishop of London, the lords of appeal in ordinary, certain other high judicial personages, ambassadors to foreign countries, the speaker of the House of Commons, as well as a few overseas representatives, and a few men of distinction in literature, art, science, and other fields upon whom the sovereign has conferred the membership as a mark of honour. The membership of the Council is life-long. But the most important part of the membership of the Council is that of the present and the past Cabinet ministers.

To-day, the Privy Council as a body has been overshadowed by the Cabinet which in origin was an informal Committee of the Council. Naturally to-day the meetings of the Council are few and far between except on the occasion of the crowning of a new monarch or a similarly important State function when the entire body is called.” “The Councillors ordinarily meet with the sovereign at Buckingham Palace as a King-in-Council, although for some years it has been possible to transact business in an emergency in the absence of the royal person.”

As regards what these meetings do, ‘It is at Council meetings that ministers and many other officials take the oath required of them and receive their seals or other symbols of office.’ “The most important business, however, is promulgation of “Orders-in-

Council," both in pursuance of royal prerogative and under authority of statute. Increasing number of administrative rules and regulations are issued by various executive departments and other agencies acting individually... Prominent examples are declarations of war and decrees summoning, proroguing and dissolving Parliament ;...and a variety of orders issued in pursuance of authority conferred in general terms in acts of Parliament dealing with such subjects as health, education and the like."

But as said earlier, the Privy Council has been overshadowed by the Cabinet which to-day is really the deliberating and initiating agency behind all policy questions. If the decision made by the Cabinet requires parliamentary approval, it is taken there. "If, however, as frequently is case, Orders-in-Council will suffice, they go rather to the Privy Council. The Cabinet decides that a given order shall be issued or that the Queen shall be advised to perform a given act. It cannot, as a Cabinet, issue such orders ; that is the business of the King-in-Council which remains the only authority competent to give certain decisions the force of law."

There are various Committees of the Privy Council, such as the Board of Trade, which seldom meet. An important Committee which does meet is the Judicial Committee of the Privy Council, composed of Privy Councillors who are or have been in high judicial office. It sits to hear appeals from parts of the British Commonwealth. It also, among other matters, hears ecclesiastical appeals from church courts and any problems referred to it by the Crown.

To conclude, the significance of the Privy Council to-day derives from the fact that the Cabinet, the main-spring of the whole government machinery is still largely unknown to the law. Orders are issued by the King by and with the consent of the Privy Council. Or, as has been said succinctly, "the cabinet officer deliberates and advises; the privy councillor decrees; and the minister executes," which means that, in law, the Privy Council still remains the real authority which gives advice to the sovereign and does the will of the sovereign except where blocked by Parliament.

*Q. Discuss the constitutional position of the House of Lords. "Its strength lies in its weakness."—Discuss.*

**Ans.** A second chamber in a unitary State is often thought of as a brake, a device for delay, a means of checking what a nineteenth century Lord Chancellor called "the inconsiderate, rash, hasty and undigested legislation of the other House." It is, however, important to realise that bicameralism as a part of parliamentary government in England did not develop because such a form of government was thought to be theoretically desirable, but because of certain practical difficulties, social and political, which were encountered in the holding of earlier Parliaments. Parliament consisted of the Sovereign, certain of his subjects summoned by personal writ, and other subjects selected by the free men. The House of Lords as a separate part of Parliament may be said to date from the first occasion on which the elected representatives of the free men met together on their own.

**Parliament without King and Commons was the House of Lords.**

The House of Lords to-day perform three kinds of function, judicial, legislative and deliberative. It is the Supreme Court of Appeal in the United Kingdom of Great Britain and North Ireland and a Court of Impeachment for the trial of important officials of the Crown. Originally the whole House of Lords, acting in its corporate capacity, heard appeal. In 1876 an Act was passed providing for the appointment of Lords of Appeal-in-ordinary, holding peerages for life. The appointment of Lords of Appeal does not interfere with the theoretical right of lay peers to be present during the hearing of appeals, but for more than a century they have not voted in judicial cases. In 1947 a change was effected which entrusts the hearing of appeals to a special Appellate Committee of the House. It is to be noted, however, that the House of Lords does not act as a constitutional Court like the U. S. Supreme Court.

The legislative powers of the House of Lords were equal to those of the Commons until 1911 but the Parliament Act of that year reduced the Lords to a definitely subordinate position. This Act provided that the House of Lords could delay money bills for one month and other bills for two years. The Parliament Act of 1949 has further reduced the period from two to one year. In short, at present the Lords are deprived of practically all powers in respect of money bills and in respect of other bills, its powers amount to a suspensive veto only.

As regards other functions of the House of Lords the opinion of the Bryce Conference of 1918 may be taken to be definitive. After saying that a second chamber should not have equal powers with the Commons, nor the power of making and unmaking ministries nor any marked permanent onesided political bias, it declared the functions of a second chamber in Britain to be, (i) examination and revision of bills from the House of Commons ; (ii) initiation of bills dealing with subjects of a comparatively non controversial character ; (iii) the interposition of so much delay ( and no more ) in the passing of a bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it, and (iv) full and free discussion of large and important questions.

In short, the present day functions of the House of Lords, apart from its judicial functions, are to serve as a sounding board for great national issues, to review pending legislation, to give careful preliminary consideration to private bills.

Now all these make clear the present role and position of the House of Lords in the government of Britain. To be more precise, we may make a list of its inabilities. First, in money matters, it cannot do anything against the wish of the Commons. Second, in other matters, it can only delay a little what the Commons has decided to do. Third, it has no control over the government, the Prime Minister invariably belongs to the Commons ; its vote does not decide the fate of the government which is responsible to the Commons only. In short, the present constitutional position of the Lords may be expressed succinctly by saying that in Britain the



sovereignty of Parliament has come to mean the sovereignty of the Commons.

In this context, the question is obvious how does the House of Lords survive ? An answer to that question may be put thus.

The objections to the House of Lords are well known. They are its size, the possibility, however unlikely, of the invasion of its lobbies by large numbers of unqualified backwoodsmen, its hereditary composition and overwhelmingly conservative political outlook. Thus the need for reform is manifest and even recognised by the Lords themselves. And proposals of reform are also not lacking, some confined to eliminating from the House those of its members who have not qualifications for service ; some proposing a combination of a reduced number of hereditary peers and a proportion of nominated life peers ; some facing a break with history and proposing an elected senate ; and some more imaginatively envisaging devolution to local or industrial chambers. But all these have not so far resulted in anything concrete partly because at no time has it been essential to achieve success and partly because some have been viewed with suspicion by the Commons itself.

In any case, the features of the House which are inherent in its history and which all wish to preserve are its independence, its indifference to unpopularity, its capacity for transacting business and the prestige derived from the experience and authority of its members. In 1948, the Party Leaders met, discussed and issued a statement embodying the points on which they agreed

and those on which they differed. They were agreed on composition—appointment on grounds of personal distinction or service. They were agreed that women should be included and in order that no one should be excluded for lack of means, that some remuneration should be paid. They were agreed that the second chamber should be complementary and not a rival to the House of Commons and that it should not be so constituted as to give a permanent majority to any political party.

They differed, however, on the old question of powers, the period of delay. So matters stand to-day. The question now is—do the principles of democratic government require that the second house should be merely a useful chamber, performing the very necessary functions of review and revision or should it be a chamber which could have enough power and authority, if circumstances ever make it necessary, to assert itself as a balancing factor in the Constitution and give the country an opportunity for second thoughts?

But though a sitting target for criticism from numerous quarters, its ability to survive, even with reduced power, is a wonder. And perhaps the most important reason lies in something which may be taken to express an aspect of the British national character, namely, the readiness to recognise facts and adjust accordingly. Thus commenting on this point, Laski has said, "it has endured only because in each of the conflicts of the last generation the House of Lords has preferred to abdicate rather than to fight and because it has thus far proved impossible to discover among parties any common

agreement to the principles upon which it should be reformed.”

**Q. Q.** *How far do you agree with the view that the Parliament Act of 1911 as amended in 1949 has transformed the sovereignty of Parliament into the sovereignty of the Crown and the House of Commons ?*

**Ans.** A basic feature of the British Constitution is the sovereignty or supremacy of Parliament. “Parliamentary supremacy implies two important principles. In the first place, Parliament has legal power to enact, amend or repeal any statute whatsoever, to amend or rescind any rule of common law, to override any decision of the Courts, and to make any established constitutional convention illegal. In the second place, no other authority or agency has the power to override or set aside anything that Parliament does.” Thus, in law, Parliament has literally absolute power to do anything and everything it likes. And in the context of the British Constitution when any action of Parliament is criticised as unconstitutional, the meaning is not that Parliament does not have the constitutional authority to make the enactment in question but that simply it is “considered to be out of keeping with previously accepted fundamental law” which, however, by no means implies that if adopted it would not be valid.

But Parliament has three aspects, represented and respected by the King, the House of Lords and the House of Commons. Though the three aspects of Parliament are outwardly separate, constituted on entirely separate principles, perform different works

in different places, meeting only on great symbolic occasions, yet as the supreme organ of the State is a corporate organ and cannot do anything without the concurrence of all its parts. Recent times, however, have seen important changes in this traditional position. First, the association of the sovereign in the business of Parliament has to-day become purely formal and ceremonial, so that Parliament has in practice become only the two Houses, the Lords and the Commons. And in the second place, the Lords also representing the nobility has been reduced to a position of ineffective subordination to the Commons. Thus whatever the theory in practice Parliament to-day means the House of Commons which now wields all the powers that belong theoretically to the King-in-Parliament. This revolutionary transformation in the respective positions of the two houses of Parliament was mainly the result of the Parliament Act of 1911 as amended in 1949. An examination of the Act of 1911 and its amendment in 1949 will show that.

The Parliament Act of 1911, one of the landmarks in the English constitutional history, reads as follows : "If a money bill, having been passed by the House of Commons, and sent up to the House of Lords at least one month before the end of the session, is not passed by the House of Lords without amendment within one month after it is sent up to that house, the bill shall, unless the House of Commons direct to the contrary, be presented to His Majesty and become an act of Parliament on the royal assent being signified, notwithstanding that the House of Lords

have not assented to the bill.” The term money bill is so defined as to include measures relating not only to taxation but also to appropriations, loans and audits. Power to decide whether given measure is or is not a money bill within the meaning of this Act is given to the Speaker of the House of Commons, with no appeal from his decision.

As regards other bills, the Act provided that “other bills if passed by the House of Commons in three successive sessions, and if sent up to the House of Lords at least one month in each case before the close of the session, but rejected by that body in each of those sessions, should become law. It was required that at least two years must have elapsed between the date of the second reading of such a bill in the first of the sessions of the House of Commons and the third reading, or final passage, of the bill in the third of the sessions.”

Clearly, the net result of the Parliament Act of 1911 was to make the supremacy of the popularly elected house which had been a fact in practice, though not in law, a matter of law henceforth, without disturbing the bicameral structure. Henceforth, the second chamber could only delay but nothing more. But the basic weakness of the bicameral system was not touched by the Act of 1911 and this in course of time necessitated the Act of 1949. And this latter Act reduced the House of Lords to a position where “it could delay general legislation only during a maximum of two sessions of Parliament and a period of one year. Without actually abolishing the House of Lords, the Parliament Act of

1949 went about as far in curtailing its authority as could be expected."

Thus there is no doubt that the powers belonging in theory to Parliament has come into the hands of the House of Commons not simply in practice but as a matter of law also. But this increase in the power of the House of Commons has necessarily meant also an increase in the power of the Crown as shown by the saying that "the power of the Crown have expanded as democracy has grown." The Crown here means the supreme executive authority of the State which to-day is the Cabinet for all practical purposes. The increase in the power of the Cabinet may be explained thus.

The emergence of the welfare State has been increasing the ambit of State functions and this has the result that the formulation of policy has to be on wider and wider fields. Also policies are meant to be implemented and in most cases they involve legislation. Therefore, policy formulation logically leads to initiative in legislation. Thus the Cabinet takes the initiative and sees a piece of legislation go safely through Parliament. Secondly, the Cabinet controls, directs and supervises the entire machinery of administration. And thirdly, an important business of the Cabinet to make the numerous departments follow a consistent and co-ordinated policy. In short, the Cabinet is the central directing instrument of government, in legislation as well as in administration. It is in Cabinet that administrative action is co-ordinated and the legislative proposals are sanctioned. It is the Cabinet which controls Parliament and governs the country.

In theory the Cabinet is subordinate to the House of Commons but in practice the relationship has been reversed, and the reasons may be put as follows. The process in which power has shifted from the House of Commons to the Cabinet is really a part of the process of democratisation. Indeed all the changes which have accompanied this broad process of democratisation, the development of the party machinery, the growing stringency of the party discipline, the replacement of the House of Commons by the electors as the government-choosing agency, have all worked in the same direction, to increase the ascendancy of the Crown in the sense of the executive over Parliament.

Thus there have been two developments, one resulting in the transfer of all powers of Parliament to the House of Commons and the other resulting in transfer of the powers of the House of Commons to the Crown, and these have given rise to the point that the Parliament Act of 1911 as amended in 1949 has transformed the sovereignty of Parliament into the sovereignty of the Crown and the House of Commons. Now though the actual developments giving rise to this opinion cannot be denied, yet it must be said that the opinion in question rather exaggerates and fails to take note of certain significant points.

First, as regards the sovereignty of the Crown, the following points may be made. Though any modern democratic State may be said to be bound to be characterised by comparative dominance of the executive over the legislature, yet the executive can by no means be said to be beyond control by the legislature.

It has been said that the British system of government is one of Cabinet dictatorship qualified by publicity. The characterisation is significant because the factor of publicity brings in the element of popular wish and feeling. A government conducted within the full glare of publicity is in a sense very much under popular control. And the point needs to be emphasised that a government even with an enormous majority cannot neglect the feeling of the House of Commons. Every government must use its power in such a manner as to maintain itself in power. This naturally creates a sensitiveness to public opinion which is the real sanction behind all power and which is expressed not merely at a general election but by all the instruments at the disposal of a free people.

Secondly, as regards the sovereignty of the House of Commons, again, the following may be said. Without denying the present day overwhelming role and powers of the House of Commons as the repository of the popular will, it would not do to forget the role of either the sovereign or the other House in all that is done by Parliament. The role of the sovereign and its importance may be seen from the saying of Maitland "We must not confound the truth that the King's personal will has come to count for less and less with the falsehood.....that his legal powers have been diminished. On the contrary, of late years they have enormously increased." And the authority of the Crown permeates all fields and functions of government. And about the role of the Lords and its importance, the following comment may be made....."even the



conservatives, despite the sentimental attachment which many of them have for the House of Lords, realise that it would not be to their interest to have a second chamber with the influence exercised prior to 1911. Nevertheless, the House of Lords has played a far from insignificant role in British Government during recent years and it may well be that the reconstruction of its membership will add to its importance. An Act of 1963 which allows a peer to stand for election and take a seat in the House of Commons after a nominal renunciation of his titles, may seem to vindicate the principle of rule by elected minister, but its actual and immediate effect was to open the highest office in the land to a peer, Lord Hume, even before his election to a safe seat."

Finally, it must be kept in mind that Parliament must in each case "act by the composition and according to the procedure which may happen to be legally in force at the time, otherwise it would be possible for some impostor assembly to call itself the true Parliament of the realm. This, after all, is why the courts will not recognise the validity of a mere resolution of either House as law."

**20. Q.** *Trace the development of the Cabinet system of government in England. What are the innovations made during the two wars? Are they now permanent features?*

**Ans.** The Cabinet is a conventional organ of government composed of a number of ministers selected by the Prime Minister. Its membership is not fixed by statute, although certain ministers are always

appointed, the number being usually less than twenty.

The system of Cabinet government came into being as one of the results of the passing of the Bill of Rights in 1689. "Unable to procure the kind of assistance that he needed from an overgrown and unwieldy Privy Council, Charles II, in 1667 drew about himself a little group of trusted persons who, from the initial letters of their name acquired the nickname of the 'Cabal'. Councillors not admitted to the inner circle naturally objected; leaders of liberal thought regarded it as a dangerous instrument of intrigue, and for a time the arrangement had to be abandoned. Soon revived, however, the device established a precedent for close working relations between the King and a select group of advisers. It remained only for the group to be widened to embrace all of the principal ministers to transform it into what is known to-day as the Cabinet."

Thus, in origin, the Cabinet was an informal gathering of those Privy Councillors who were also ministers, meeting at first with and later without the sovereign. The Cabinet assumed its present shape when the accession of the Hanoverian kings with their limited knowledge of English, the British Constitution and the British way of life had severely curtailed the personal participation of the sovereign in executive government and made a substitute essential.

This fortuitous change of practice was to prove to be of momentous consequence, namely the rise of the office of Prime Minister. In the absence of the king, someone was needed to preside over the Cabinet meetings,

organise the business and report the results of the deliberations to the king. This person was in effect to do for the Cabinet what the Speaker had in earlier times done for the House of Commons. But the course of time saw an inevitable change in the role. Gradually the Cabinet began to acquire the character of the all powerful executive government and together with that there was corresponding increase in the power and prestige of its Chairman. In this way, Robert Walpole was the first man to be known as the Prime Minister which, it may sound curious, he much resented. Another consequence of the king's absence was that the ministers began to go in for uniformity for it was hardly practicable for the Prime Minister to go to the king with several different advices. This again logically leads to another development. For rendering an unanimous advice, or at least an agreed advice, it has to be a homogeneous body. This together with the rise of political parties differing from one another on the basis of distinct programmes led to the practice of drawing all Cabinet ministers from one party. Again for remaining in office, parliamentary approval was necessary for the Cabinet and thus came the theory that the Cabinet was responsible to Parliament, or to be more precise, to the House of Commons.

The Cabinet is not in itself an executant in that it has no legal authority, its decisions being valid by convention and not by law. As a political machinery, it exhibits the following characteristics :

1. The exclusion of the king : The king does not attend the meetings of the cabinet. This practice dates

from 1714 and arose because George I the then king did not know English.

2. The close correspondence between the Cabinet and the Parliamentary majority for the time being secured in two ways : (a) the leader of the majority party in the Commons forming the government, and (b) every minister having to be a member of one or the other House of Parliament.

3. Political homogeneity of the Cabinet : members of the Cabinet hold the same political views through belonging to the same political party.

4. Political responsibility to the Commons : the members of the Cabinet are answerable to the House of Commons for every policy they embark upon and every action they take. This responsibility is both several and collective.

5. The ascendancy of the Prime Minister : the Prime Minister is the key stone of the Cabinet arch.

The Cabinet meets in private and the proceedings are strictly confidential. Its members are bound by their oath as Privy Councillors not to disclose any information. The theoretical reasoning for this secrecy is that a Cabinet decision is advice to the sovereign, whose consent is necessary before it is made public. From a practical point of view, secrecy is essential in the interest of unprejudiced debate which can take place only if there is no risk of publicity for anything said in a Cabinet meeting.

With an expansion in the volume of work natural in modern times and particularly during a war, the burden on the Cabinet increases very much. Some relief may

be found through the use of small Committees of Cabinet, which are now an established feature of Cabinet procedure. But during a war, even this was found to go only a little way. The difficulty faced by the Cabinet was summed up by Lloyd George by saying you cannot wage war without a sanhedrin. He as the Prime Minister during the world war I set up a small War Cabinet of five members. This small body was relieved of all departmental duty and was charged with planning the conduct of the war. And since during a war all issues become subordinate to the one predominant issue, naturally this War Cabinet became the Cabinet. But this device also had its difficulty the chief of which lay in the divorce of deliberation on policy from the direction of administration in the several departments.

During the world war II also a War Cabinet was set up but along different lines, it being "composed of Ministers who headed the departments most vitally concerned with the prosecution of the war."

The much greater governmental activity involved in the much larger legislative programme of the post war Labour Government entailed much greater congestion of Cabinet business than before. Many new departments came into being, the ministers concerned being, however, excluded from the Cabinet.

No device has yet been found to reduce the Cabinet to the most effective size of perhaps ten or twelve. One way would be to amalgamate two or more closely related departments into a single department. In practice, however, what we find is not amalgamation but something of a superministry, to supervise

the activities of a few related ministries. The Ministry

Defence Act 1916 provides for a Minister of Defence who is charged with formulating and applying a unified policy for the armed services. The Minister of Defence since his appointment under this Act has been a member of the Cabinet. This, taken as a trend of the future, may come some day to be composed largely of such superministers. A further tendency in this direction can be detected in the conferring on the Chancellor of the Exchequer of a co-ordinating role in matters of economic policy. Further more, although the War Cabinet has disappeared, there is still a small inner group in the Cabinet on whom the Prime Minister places special reliance. This may well be a super-ministry in embryo. At any rate, the effective working of the Cabinet system under present circumstances seems to require a still further concentration of responsibility and power on fewer men.

In other words, the informal character of the Cabinet meeting without any agenda or without keeping a record of its deliberations, has vanished under pressure of circumstances both peace time and war time. In 1916 along with the appointment of a War Cabinet, a special official was appointed, the Cabinet Secretary whose function became "preparing agenda for meetings, keeping minutes, and circulating information among ministers entitled to receive it. Designed for the duration of the war, the arrangement proved so useful that in 1919 steps were taken to perpetuate it. Nowadays the Secretariat usually referred to as the Cabinet office, is regarded as an indispensable Cabinet

adjunct." Naturally, the business of the Cabinet office to-day has expanded very greatly. To-day the Cabinet office prepares papers which set forth salient facts, and these are circulated among the members beforehand so that when they assemble they may consider items of business with some degree at least of expertness. In short, many innovations have been made under pressure of work, particularly during the wars, but all these to-day are permanent parts of the Cabinet procedure.

*Q. What are the conventions of the Constitution? Classify them and state the sanction behind them.*

*Ans.* An important feature of the British Constitution is the existence of a large number of conventions which Dicey called the "Conventions of the Constitution." Conventions are rules based on custom or practice which regulate to a very large extent the relations between the public authorities and the working of the political machinery. Unlike laws, they remain beyond the cognisance of the Courts but they are nevertheless no less important than formal laws in the working of the Constitution. The Conventions or rather their important role in the political life has been variously recognised and they have been characterised as the unwritten maxims of the Constitution and the motive power of the Constitution. In the words of Jennings, the short explanation of conventions is that they provide the flesh which clothes the dry bones of the law, they make the legal Constitution work, they keep it in touch with the growth of ideas.

A convention may be said to differ from law in the following respects : (a) Law is enforceable through a Court of law while a convention is not. There is no formal method of determining when a convention is broken. (b) Laws are precisely formulated for the most part while it is nobody's business to formulate the conventions. "Conventions grow out of and are modified by practice and at any given time it may be difficult to say whether or not a practice has become a convention." (c) "Laws commonly have a greater sanctity and there is a greater reluctance to break them."

But "the distinction between laws and conventions is not really of fundamental importance" and "conventions are not really very different from laws."

Broadly the conventions of the British Constitution can be divided in three groups, those relating to the royal prerogatives and the Cabinet government, those relating to the working of Parliament, and those relating to the Commonwealth.

The Revolution of 1688 finally established the supremacy of Parliament but many important powers and function such as the conduct of foreign relations, the command over the armed forces, regulation of the government expenditure, etc. still remained with the king. So arose the problem of reconciling these royal powers with the supremacy of Parliament and the solution came through the rise of the Cabinet system. The entire Cabinet system is based on conventions. Under this system, the king always appoints and accepts the advice of the ministers who represent the people. There is no law obligating the king to do this and no



Court of law in the land will recognise such a principle. But the principle is nevertheless of the greatest practical significance and grew of through a long course of struggle between the monarch and the people in which the people gradually wrested power from the monarch. Ultimately, a condition has been created in which everything is done by the representatives of the people but in the name of the monarch. In this way, an ancient institution, monarchy, has been reconciled with modern democratic principles. Some of the more important conventions in this field are, the monarch gives his assent to a bill passed by both houses of Parliament ; government is formed by the party with a majority in the House of Commons and the leader of that party is invited by the Sovereign to become the Prime Minister ; the monarch accepts the advice of the ministers ; the government remains in power during the pleasure of Parliament which must have at least one meeting a year.

Besides these, there are a few others too on which, however, some difference of opinion exists. For example, the power to appoint the prime minister and to dissolve Parliament on the advice of the prime minister, are legally with the king. But how these powers are to be applied in practice is a matter of much controversy and it is not possible to say anything definite about these.

Secondly, there are the conventions which govern the working of Parliament. The working procedures in both houses of Parliament, the procedure of law-making, parliamentary privileges, etc. are all matters of convention. The rules or rather the standing orders

which regulate these matters are not to be recognised by the Courts but Parliament itself has the authority to enforce them which, therefore, may rightly be said to occupy a position of supreme importance in the constitutional life of the country.

Thirdly, there are a host of conventions regulating the relation of Britain with the Commonwealth countries. Canada, Australia, Newzealand, etc. obtained their self rule through the operation of constitutional conventions. The Statute of Westminster 1931 tried to formulate systematically some of the principles in this field but a very large area was still left open for the operation of conventions.

Now, the question is what gives conventions force or why are they obeyed? What is the sanction behind them?

Dicey was of the opinion that conventions are obeyed because violation of conventions would ultimately involve breach of law. For example, annual meeting of Parliament is an important convention which, if not observed, will mean that the annual Army Act will expire, and the annual taxes will lapse. The consequence in such a case is that the government will have no authority to maintain an army and no authority to make any payment to person serving the government. Naturally such a situation cannot be allowed to develop and so conventions are obeyed.

But this explanation of why conventions are obeyed may at most be taken to show one reason but it certainly cannot be the whole of it. "President A. L. Lowell of Harvard once pointed out that the United

Kingdom is not obliged to continue holding annual sessions of Parliament simply because a new mutiny act must be passed and new appropriation made every year." Parliament enjoys absolute legal sovereignty and therefore, it is perfectly within its competency to change the laws in such a manner that the violation of a particular convention or a set of conventions will not involve any breach of law. For example, there is no legal bar to Parliament passing a permanent Army Act and authorising taxation and expenditure for a number of years.

So the reason why conventions are obeyed must be sought elsewhere. And when that is done, it will be seen that ultimately public opinion provides the real sanction behind the conventions. In Britain politics is a kind of sport and the conventions may well be regarded as rules of the game. And those who participate in it will have to abide by the rules of the game. Persons or parties not playing fair, that is, not playing according to the rules of the game will incur the displeasure of the electorate which may then take action during the election. This fear of popular displeasure resulting in electoral defeat must surely be the most potent force in this regard. And no part of the political machinery, including the monarch, can be said to be really free from its grip. The monarch obeys the conventions, for, through them it accepts the democratic principle and its own political neutrality on which rests its continued existence. The same factor may also be shown to be operating in respect of other parts of the political system also.

Again, a partial reason why conventions are obeyed can also be found in the possibility that if a convention fails to be observed, the particular matter may be made a matter of law. For example, the Parliament Act of 1911 would not have been necessary had the House of Lords, in violation of convention, not refused to ratify an important bill passed by the Commons.

Further, it should be noted that regard for tradition also plays its part in the enforcement of the conventions. This regard for tradition, a very important aspect of the British national character, creates a climate of opinion in which it is extremely difficult to violate the conventions.

But all these discussions about the conventions and the force behind them leave one point untouched. That is all these are liable to be accepted so long as the society may maintain a basic unity transcending all differences between classes and strata ; but if and when such unity itself be in the melting pot raising thereby the fundamental questions as to the ends of the existing social, political, economic arrangements, what then ? One thing is clear, that under such a circumstance, the conventions will lose much of their force inasmuch as they are apt to be interpreted differently and put to different uses. Thus it may be said, in the words of Laski, "men regard constitutional principles as binding and sacred because they accepted the ends they are intended to secure."

Finally, a word about the value of the conventions. They enable the Constitution to bend without breaking ; to adjust itself to changing needs without any radical

overhauling. Thus the convention that the king does not veto a bill passed by Parliament is an adjustment of monarchy to the needs of a democratic age, kingship being retained without prejudice to the supremacy of the popular will. Also they help the smooth working of the Constitution. The conventions regarding the Cabinet system enable the Legislature and the administration to work in Unison, and those relating to the link between Britain and the Commonwealth Countries help to maintain their close relationship without prejudice to either the independence or the self-respect of any one.

2. *Discuss the nature and extent of the privileges of Parliament with special reference to the jurisdiction of the Courts of law in relation to them.*

**Ans.** Both Houses of Parliament enjoy certain privileges and immunities designed to protect them from unnecessary obstruction in carrying out their duties. The historical reason for their existence is that Parliament is strictly the "High Court of Parliament", and superior courts of law maintain similar privileges which protect them in the exercise of their judicial functions. Although mainly similar in each House, for the privileges belong essentially to Parliament as a whole, there are some differences in effect.

In the House of Commons, at the beginning of each session since about the middle of the sixteenth century, the Speaker has claimed, on behalf of the Commons, "their ancient and undoubted rights." These include freedom from arrest during sessions of Parliament and

for forty days before or after a session, ( not for a criminal offence or contempt of court ), freedom of speech in debate, and the right of access to the Crown which is a collective privilege of the House and exercised on behalf of the House by the Speaker. Further privileges, rarely exercised, are to debate in secret, the right to control internal proceedings and the right to pronounce upon legal disqualifications for membership and to declare a seat vacant on that ground. But perhaps the most important right of the House is "an arbitrary power of committal for contempt which cannot be enquired into by the Courts, provided that the cause of the contempt is not stated." And "Any act or omission which obstructs or impedes either House of Parliament in the performance of its functions or which obstructs or impedes any member or officer of such House in the discharge of his duty or which has the tendency, directly or indirectly, to produce such results may be treated as a contempt, even though there is no precedent for the offence."

As regards the privileges of the House of Lords, a peer remains permanently covered by the privilege of freedom from arrest, enjoys freedom of speech in debate, enjoys individually the freedom of access to the Sovereign, the right to try and to be tried by fellow peers on charges of treason and felony. And the House as a whole has the right to commit for contempt and to exclude disqualified persons from taking part in the proceedings of the House. These privileges are not claimed formally by the Speaker, as in the Commons, they exist independently without grant.

Now as regards the nature and extent of Parliamentary privileges, the following may be said. "Around parliamentary privilege some of the great battles of the Constitution have been fought....Parliamentary privilege began as a means of ensuring to the Crown the unhampered attendance of its servants when engaged on public affairs. Its enforcement lay largely with the Crown until Henry VIII permitted the Commons to assume jurisdiction. Thereafter it served to enhance the prestige of the Commons and under the Stuarts was a weapon often used against the Crown itself. In the eighteenth century the harsh reckless use of parliamentary privilege brought about a reaction. It was in this period, too, that we come across the first of the great series of cases which lay down the proper place of privilege in the Constitution." Some of the cases may be briefly mentioned.

"The story starts with Sir John Holt, who said that the privileges of the House of Commons are well known, and are founded upon the law of the land, and are nothing but the law. And if they declare themselves to have privileges, which they have no legal claims to, the people of England will not be estopped by that declaration." In *Ashby v. White*, Ashby sued White and other returning officers for maliciously refusing to accept his vote in an election for the borough of Aylesbury. The Court of Queen's Bench held, Holt C. J. dissenting that no action lay...Holt's dissenting judgment was upheld in the House of Lords. The Commons, however, did not acquiesce in this judgment and when one Paty and four other electors of Aylesbury

brought similar actions against the returning officers, the plaintiffs and their counsel were committed to prison by order of the Commons for breach of privilege. On *habeas-corpus* proceedings brought to secure their release, the Court of Queen's Bench held, Holt C. J. again dissenting, that the Court had no jurisdiction. Holt C. J. stated that where the return to the writ was insufficient in law to constitute a breach of privilege or contempt the plaintiffs ought to be released, a view which has been upheld in subsequent cases. Difficulties having arisen as to whether a writ of error lay to the House of Lords, Queen Anne resolved the deadlock by proroguing Parliament, which set the plaintiffs at liberty and they went on to win their actions against the returning officer. The principle of these cases is well summed up in the following words: "It is the birthright of every Englishman who apprehends himself to be injured to seek for redress in your Majesty's Courts of justice; and if there be any power that can control this right or can prescribe when he shall and when he shall not be allowed the benefit of the laws, he ceases to be a free man and his liberty and property are precarious."

In another case *Burdett v. Abbot*, it was held by the Court that "if facts are stated in the return to the writ of *habeas-corpus* which could not reasonably be considered a contempt, the Court must act upon it as justice may require."

There was the famous case of *Stockdale v. Hansard*. "A report of prison Commissioners contained a libel of Stockdale, and the Commons had ordered the



Parliamentary printers, Messrs. Hansard, to publish the report for sale to the public. In the subsequent libel action by Stockdale, Hansard, under instructions from the Commons pleaded that the report had been published by order of the House, and that it was, therefore, covered by Parliamentary privilege. The Court held that this was not one of the privileges of the House.<sup>1</sup> Freedom of speech covered papers passed between members themselves, but not those allowed to pass into the hands of the general public ”

Then came the case of the Sheriff of Middlesex (1810) which was the sequel to Stockdale v. Hansard. The Commons had passed resolution that the publication of reports, etc. was essential for the proper functioning of Parliament, and that the House had the sole right of judging the validity and extent of any privileges claimed. The House allowed the damages to be paid in Stockdale's case but made it clear that any future attempt to bring such an action would itself amount to a contempt of the House. Nevertheless, Stockdale proceeded to bring another similar action against Hansard, and judgment was given in Stockdale's favour in the absence of any plea by defendant but when the Sheriff of Middlesex levied the damages awarded in this latter case, and he refused to give the sum back when so ordered by the Commons, he was forth with imprisoned by order of the Commons for contempt and breach of privilege of the House. Although the Sheriff applied for *habeas-corpus*, his application failed because the Speaker's warrant of committal did not contain any reason for the allegation of contempt or breach of privilege.”

The position thus is that "if the House commits for contempt generally, without stating reasons, then the Court is unable to look behind the return. But if, in the warrant of committal, facts are stated which on no reasonable ground could be considered as a contempt but rather a ground of commitment palpable and evidently arbitrarily unjust and contrary to every principle of positive law or natural justice, then the Court must look at it and act upon it as justice may require." Clearly the result of this judgment "enables the House to avoid the consequences of the ruling in *Stockdale v. Hansard* for, by committing for contempt without giving any reasons the House of Commons may choose to treat as a breach of privilege that which no Court would recognise as a privilege." "Ultimately the Parliamentary Papers Act was passed in 1840 to make law the very extension of privilege which the Commons had claimed, and the Sheriff was set free when the session of Parliament ended shortly afterwards. The enactment of the statute may perhaps be regarded as an act of conscience by the Commons."

To conclude, "parliamentary privilege can be defined as that law for the Member of Parliament which is no law for the electorate. But it is law. It is for the ordinary Courts to decide whether or no the privilege claimed exists and what its limits are, although it is true that in neither case will they enquire into the mode of user of an admitted...privilege...for many years the House of Commons claimed and in the opinion of some, still claims, the right to determine not merely the breach of an admitted privilege but also

whether or not the privilege in question exists. The better opinion today is, however, that it is for the Courts alone to determine questions relating the existence and extent of Parliamentary privilege."

Finally, "The original reason for the existence of the privileges, that is to protect the High Court of Parliament has basically disappeared, for, except where the House of Lords acts as a final Court of Appeal, the real functions of Parliament are now those of debate and legislation. It cannot any longer be the case that all the existing privileges are necessary to protect members in the discharge of their duties. In particular it may be argued that the power to punish should be transferred from the Houses themselves to the Courts of law, so that the House may no longer seem to be judges in their own cause. Diverse activities of individuals outside the House may be held by the House to amount to contempt and the Courts of law are powerless to decide otherwise. The present indications are that M. P.s since the Strauss affair have been more circumspect about claiming that their privileges have been infringed."

*Q. State the law and practice of England relating to the right of holding public meetings and processions with reference to leading cases*

**Ans.** Every modern democratic State is characterised by the fact that its citizens enjoy certain rights. Some of these rights, again, are called fundamental and are as such accorded a place of special importance by being made an integral part of the Constitution

which, with most modern States, is written. But in England there is neither a Constitution in the sense of a written document embodying the basic law of the country, as there is, say, in India, nor, therefore, a list of constitutionally guaranteed fundamental rights. That, however, should not be taken to mean that citizens in England do not have any rights or that there are no guarantees safeguarding their rights. The position in England in this regard may be put thus : "under the Constitution there are no formal guarantees of liberty apart from the declarations of rights contained in the ancient charters and the restrictions on the arbitrary power of the Crown imposed by the Revolution Settlement of 1688. It is in the law of crimes, and of tort and contract, part of the ordinary law of the land, and not in any fundamental constitutional law, that the citizen finds protection for his political liberty, whether it is infringed by officials or by fellow-citizens." This makes it clear that in England also rights of citizens and their guarantees exist but both are subject to the overall power of alteration or abolition by Act of Parliament. Thus as far as British constitutional law is concerned, our main task is to determine in what way individual liberty is restricted by law and not how it is preserved. With this background, we may describe the position regarding the right of holding public meetings and processions as follows.

In English law, no positive right to hold public meeting can be said to exist. As Dicey puts it, just as the right to freedom of speech is little more than

the right to say anything which a jury of twelve shopkeepers think it expedient to be said or written, just so "the right of assembling is nothing more than a result of the view taken by the Courts as to individual liberty of person and individual liberty of speech." "Public meeting includes any meeting in a public place and any meeting which the public or any section thereof are permitted to attend, whether on payment or otherwise. Public place means any highway, public park or garden, any sea-beach, and any public bridge, road, lane, footway, square, court, alley or passage, whether a thoroughfare or not; and includes any open space to which, for the time being, the public have or are permitted to have access, whether on payment or otherwise. Meeting means a meeting held for the purpose of the discussion of matters of public interest or for the purpose of the expression of views on such matters." And the whole thing is governed by laws relating to public nuisance at common law, obstruction to the highway and unlawful assembly.

"An assembly upon any part of the highway is a public nuisance at common law which may be prosecuted by indictment. It is, also, an offence under section 72 of the Highway Act 1835 to obstruct the passage of any footway or other highway and it is no defence that the obstruction is of part only of a highway, so that persons not taking part in the meeting can walk around it (*Homer V. Cadman* 1886). Nor is there any right to hold a meeting on a common or foreshore" for "practically all commons, parks and other open spaces are subject to byelaws made under statutory authority."

Then there is the law relating to unlawful assembly. When three or more persons either assemble to commit or when assembled do commit, a breach of the peace, or assemble with intent to commit a crime by open force, or assemble for any common purpose, lawful or unlawful, in a manner which gives firm and courageous persons in the neighbourhood reasonable cause to believe that a breach of the peace will occur, they are guilty of a common law misdemeanour. But "an assembly in itself lawful does not become unlawful merely because it is feared that some other persons may cause a breach of the peace by attempting to interfere with it." "In *Beatty V. Gillbanks* which arose out of opposition to the Salvation Army in its early days, the local Salvationists had been convicted of unlawful assembly and ordered to find sureties to keep the peace by a court of petty sessions. On appeal to the Divisional Court it was held that since the association was for religious exercises an assembly and procession in the streets was not in itself unlawful. The disturbance of the peace was caused by the opponents of the Salvationists who had on several occasions violently interfered with their activities. It was clear that, had the Salvationists not met in public and marched in procession, there would have been no disturbance of the peace. Moreover previous meetings had caused disorders so that the Salvationists knew that similar consequences were likely to ensure. But since the disturbances were caused by people antagonistic to the Salvationists and they themselves had committed no acts of violence, they could not be convicted of unlawful assembly and be bound over to keep the peace." Again,

disorderly behaviour for the purpose of preventing the transaction of business at a lawful public meeting has been made punishable under the Public Meeting Act, 1908, as amended by section 6 of the Public Order Act, 1936. Thus while law does not countenance any attempt to disrupt a meeting by some antagonistic outsiders, law also does not countenance any threat to the peace from the organisers or the speakers at a meeting. "By section 5 of the Public Order Act, 1936, any person who in any place or at any public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned is guilty of an offence." "Section 1 of the same Act prohibits the wearing of political uniforms." Any kind of private political army "employed for the use or display of physical force in promoting any political object" is also prohibited under Section 2 of the same Act, which also prohibits the possession of an offensive weapon at public meeting or procession. Even English law goes to the length of permitting preventive detention though with the order of a Court. Here "It is not necessary that any particular person should have been threatened (*Lansbury v. Riley*, 1914), nor, indeed, that there should have been anything calculated to lead to a breach of the peace in the sense of violence (*R. V. Sandback*, *ex parte Williams*, 1935)."

The law relating to processions can hardly be distinguished from those relating to meetings, though such a distinction is made in Section 3 of the Public Order Act, 1936. "A procession is different from a meeting in that its members are exercising their rights of passing and

repassing along the highway. It is, therefore unlikely that proceedings for trespass by the owners of the subsoil would ever be brought against the members of a procession though procession may constitute so serious an obstruction of the high way as to amount to a public nuisance." Thus it may be said that processions also, like public meetings, are regulated by civil action for trespass, civil or criminal proceedings for nuisance, and by miscellaneous statutory powers.

Generally, public processions come under the regulation of local acts or local bye-laws. Also Section 3 of the Public Order Act, 1936 "empowers a Chief Officer of Police who has reasonable ground for apprehending that a procession may occasion serious public disorder" to "give directions imposing upon the persons organising or taking part in the procession such conditions as appear to him necessary for the preservation of public order, including conditions prescribing the route to be taken and conditions prohibiting the procession from entering any specified public place." Refusal to obey such directions is a criminal offence. Moreover, with the consent of the Home Secretary all processions may be prohibited in a particular area for a period not exceeding three months.

To sum up, "a meeting can lawfully be held only on private premises with the consent of the owner, or on a public open space or in a park in which there is no right of way, and even then only with the consent of the local authority and subject to its bye-laws." And "a procession need amount to no more than the collective exercise of the right of passing and re-passing along the high way. It will depend upon the facts of each case



whether this constitutes a reasonable use of the high way and whether other members of the high way are obstructed thereby."

But before concluding, some attention should be paid to another aspect of the issue raised by the right of holding public meetings and processions and their regulation by law, common or statute. This is "what has been called the public nuisance aspect which may result from freedom to speak and to demonstrate in public to the annoyance of one's neighbours." This means a concern for the maintenance of the peace or prevention of a breach of the peace. Thus it necessarily implies a heavy responsibility for those entrusted with the task, the police, who clearly must have some discretionary powers to decide at what point they are to step for the sake of order. Again, care should be taken to prevent either officious or overcautious behaviour on the part of the police. Thus the legal position is that "the attention of the police should primarily be directed against those who seek to disrupt meetings" and "Justification for this view may be found in the famous charge to the Bristol Grand Jury by Tindal, C. J., on the occasion of the Reform Bill riots in that City, and in the resulting case of *The King v. Pinney*." Similar considerations also justify the powers given to the police regarding processions because "an appeal to reason which freedom of speech is designed to secure must be defeated if the appeal is made inaudible by counter demonstrations." It may also be mentioned that the Public Order Act, 1963 greatly increases the penalties laid down in the previous Act.

“Thus English law is strict not only in defence of the Constitution as by law established, but also in defence of public order ; and...it has been made stricter in recent years both by Legislation and by Judicial decisions.” There is also a substantial amount of discretionary power at the disposal of the police which, there is the danger, may not always be properly used. But the supreme fact to be kept always in mind is that the fundamental liberty is that of free elections, and the others, including some at least of their limitations, follow from it.”

**Q.** *Examine the provision of the Statute of Westminster and discuss the effects on the constitutional relation between Britain and the Dominions. What is the present position ?*

**A.** The Statute of Westminster, 1931 is an Act of Parliament of the United Kingdom, given statutory recognition to the resolution passed by the Imperial Conferences in 1926 and 1931. The net effect of the passing of the Statute was to introduce some important changes in the constitutional relationship between United Kingdom and what were up till then as internally self-governing colonies. Now in order to appreciate the changes brought about by the Statute, we are first to have a look at the position existing prior to the passing of the Statute. And that position may be described as follows.

First, there was the power of disallowance which, however, had fallen into disuse, not having been exercised in relation to Australian legislation since 1862 and in relation to Canadian legislation since 1873.

Secondly, the Governor-Generals of the Dominions

had large discretionary powers including the power to reserve bills. There were also the constitutional provisions requiring such reservation of bills dealing with particular subjects.

Thirdly, according to the Colonial Laws Validity Act, 1865, any law of a colony was to become void on the ground of repugnancy to an Act of United Kingdom Parliament applying to that Dominion.

Fourthly, these Dominions were without power to make laws taking effect outside their own territories, for example, to punish crimes abroad.

Fifthly, there was the legal power of the United Kingdom Parliament to make laws for the Dominions though, by convention, this power was always exercised in consultation with and with the consent of the Dominion concerned.

Sixthly and finally, the Constitution of Canada and sections 1 to 8 of the Commonwealth of Australia Constitution Act could only be amended by an Act of United Kingdom Parliament.

The Imperial Conference of 1930 in its resolution recommended that the Dominion should be free to either abolish the power of disallowance by constitutional amendment or to request for such an Act of the United Kingdom Parliament; that the Dominions should be free to abolish both discretionary and compulsory reservation; that the Colonial Laws Validity Act should cease to apply enabling the Dominions to amend any such Acts; that the Dominions should have the power to make extra-territorial legislation. And with regard to the power of making amendments to their Constitutions,

the Conference did not make any positive recommendation in view of the fact that, both Canada and Australia being federal States, any enlargement in the power of Canada or Australia might create difficulties for the federal State relationships. These recommendations with minor modifications were given legal effect by the State of Westminster 1931 passed by the United Kingdom Parliament on December 11, 1931.

“The preamble to the Statute affirms the free association of the members of the British Commonwealth of Nations united by a common allegiance to the Crown, and records that it would be in accord with established constitutional position that any alteration in the law touching the succession to the throne or the royal style and titles should hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom. The preamble further sets out, in addition to a similar provision made in section 1 of the Statute itself, that it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the Dominions otherwise than at the request and with the consent of that Dominion.”

As regards the operative part of the Statute, Section 2 States “that the Colonial Validity Act, 1865, should cease to apply to the Dominions or to the Provinces of Canada ; that the Dominions and the Provinces of Canada should have power to repeal or amend Acts of the Imperial Parliament in so far as they form part of the law of that Dominion ; and that no law of either a Dominion or a Province of Canada should be void on

the ground of repugnancy to an Act of the Imperial Parliament or to the law of England."

As regards the question of the power of the Dominions to affect the prerogatives in regard to them, "In *Attorney-General for Ontario v. Attorney-General for Canada*, it was held on a reference to the Judicial Committee that it would be *intra vires* the Parliament of the Dominion to enact legislation to abolish all appeals from all Canadian Courts, Dominion and Provincial, Civil and Criminal, to the Privy Council, including special leave to appeal granted under the prerogative."

Section 3 States that the Dominion Parliaments shall have full power to make laws having extra-territorial operation. An anomaly, however, remains in that the Provinces of Canada and the States of Australia remain in the previous position, that is, without the power to make extra-territorial legislation.

Section 4 states that no Act of the Imperial Parliament passed hereafter shall extend to a Dominion as part of the law of that Dominion unless it is expressly stated in the Imperial Act that the Dominion has requested and consented to the enactment thereof.

Sections 7, 8, 9 maintain what may be called two odd and perhaps anomalous legal links between the United Kingdom and Canada and the United Kingdom and Australia. In the Canadian federation, specific powers are vested in the provincial authorities, and the residue of power remains in the federal Parliament and Government. And in Australia while specific powers are vested in the Federation, the residue of power rests

with the States. Thus clearly the giving of further powers of constitutional amendment to Canada and Australia would have involved the removal of the safeguard to provincial and State rights which was afforded by the necessity of legislation by the Imperial Parliament in order to amend the Constitution of Canada or sections 1 to 8 of the Commonwealth of Australia Act, 1900. "While such additional powers will naturally follow if the Provinces or the States so desire, meanwhile section 7 states that nothing in the Statute shall extend to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, and that the new powers conferred upon the Dominion Parliament and the provincial legislatures of Canada shall be restricted to enacting laws within their respective spheres of competence." Section 8 states that "nothing in the Statute gives any new power to alter the Constitutions of the Commonwealth of Australia or New Zealand," and section 9 denies the Commonwealth and new power "to legislate in any matter not within its authority, but within the authority of the States."

Australia, through the Statute of Westminster Adoption Act, 1942 enacted by the Commonwealth Parliament adopted sections 2, 3, 4, and 5, 6 dealing respectively with merchant shipping and Courts of Admiralty, with effect from September 3, 1939. "Similarly the Parliament of New Zealand adopted sections 2-6 in 1947 and thereupon requested and consented to the enactment at Westminster of the New Zealand (Amendment) Act, 1947, which removed all restrictions upon the power of constitutional amendment by the Parliament of that

Dominion," which means that section 8 no longer applies to New Zealand.

The Commonwealth of Nations, formerly known as the British Commonwealth, or at an even earlier period, the British Empire is really a free association of free nations. These free and independent members were all originally subordinate to the United Kingdom, but have attained their status at different times, Canada being the First in this regard, followed by Australia, New Zealand, the Union of South Africa ( now out of the Commonwealth ), the Irish Free State ( now the Republic of Ireland and out of the Commonwealth ) and New Foundland ( now the tenth province of Canada). The Statute of Westminster granted these, till then known as internally self-governing colonies, full legislative independence regarding thier internal and external affairs. And after the passing of the Statute, most of the Dominions then in existence passed constitutional measures which emphasised their independent sovereign status within the British Commonwealth. After the second world war, many nations attained their independence of the British Imperial rule but decided to stay on as free and equal members of the Commonwealth, even though some new nations became republics, thus transforming radically the nature of the Commonwealth as an association.

"It seems that the granting of independence by the United Kingdom to a country which possessed the status of, for example, a colony is a question for the United Kingdom Government and Parliament alone. But the approval of all the existing independent members must

be obtained before the newly independent nation may take its place in the Commonwealth as an equal with the existing members." Another point to be noted is that the republican members of the Commonwealth recognise the Monarch as the symbolic Head of the Commonwealth. Again, there are a few technical fetters upon the Canadian and the Australian Parliaments but all agree that these are mere "theory and has no relation to realities." Finally, no doubt "there are a number of loose links between full members, all of which could be broken at any time by any member acting unilaterally."

*Q. What is the English law relating to official secrets with reference to ministers and permanent servants of the Crown?*

*Ans.* In England there is, it is well known, no written Constitution and no constitutionally guaranteed fundamental rights. But rights as well as their guarantees are there, these exist as a part not of a fundamental law as embodied in a written document but of the regular law of the land. Thus in connection with the rights under the English constitutional law, the question is how and in what way individual liberty is restricted by law and not how it is preserved. In this way the laws relating the official secrets can be looked upon as some of the many restrictions on the rights of the people, and these may be described as follows.

There are the Official Secrets Acts, 1911 to 1939 having for their main purpose "the prevention of espionage and the communication of any information which



may be calculated to prejudice the safety of the State in the hands of a potential enemy." This is a quite legitimate objective and has acquired added importance in the post-world war II period. This is shown by the Atomic Energy Act, 1946 section 11 of which "further strengthens the provisions of the Official Secrets Acts in a field which is obviously related to national security." But naturally consistent with the general and rather vague nature of the objective, such enactments must be framed "in terms wide enough to prevent the publication of any communication made in confidence which it might be detrimental to the public interest to disclose." And this generality naturally creates the consequence that such an enactment may very well "be used to stifle the discussion of information derived from official sources which has little or no bearing upon the safety of the State."

The Official Secrets Act, 1911 S. 2 (i) states that "If any person having in his possession or control any information which has been entrusted in confidence to him by any person holding office under Her Majesty... (a) communicates the information to any person other than a person to whom he is authorised to communicate it...that person shall be guilty of a misdemeanour."

The language of the law is such that the offence can be committed by disclosing any information, however trivial and irrespective of whether or no the information disclosed bears any relation to matters of national importance or safety. But for prosecuting any one under this Act, the consent of the Attorney-General is necessary and this clearly provides a salutary check on

the possibility of the Executive suppressing under its cover. That, however, cannot be considered enough in view of the fact that "much information which comes the way of a civil servant or member of the Forces in the course of duty is entrusted to that person in confidence. Thus it would be a breach of this section for an officer of the Board of Inland Revenue to disclose the contents of an income-tax return deposited in his office."

Again, the Official Secrets Acts have been used in order to prevent the passing or publication of information not in itself prejudicial to the national interest but exposing the inefficiency or lack of integrity of a Government Department or public authority. Thus, any information about what goes on in a prison establishment has been considered protected by the Official Secrets Acts.

Further, "A police constable takes an oath of office under the Crown and is therefore a person holding office under Her Majesty within the meaning of S. 2 (1) of the Act of 1911. If he discloses to a newspaper reporter information relating to an offence, even if it be of no particular public interest, both he and the reporter who makes use of the information as news are on the face of it guilty of offences. It was formerly the law that refusal on demand by an officer of the police not below the rank of inspector to disclose the source of information obtained in breach of the Official Secrets Acts constituted a misdemeanour (*Lewis v. Cattle*, 1938), but by the Official Secrets Act, 1939, this special power of interrogation is restricted to cases covered by S. 1 of the Official Secrets Act, 1911, which relates to

acts of espionage. Moreover, there is a further safeguard that except in cases of urgency the consent of a Secretary, of State is a condition precedent to the exercise of this special power of interrogation."

Moreover, there are wide powers of search upon mere suspicion of the commission of an offence under these Acts, and these powers are not limited by the requirement that a search warrant can only be issued by a judicial authority.

To conclude, while "the wider governmental activity extends, the greater is the number of ordinary citizens who may be put in peril of prosecution for disclosing an official secret," and while conceding that there must be some degree of control by law, it being necessitated and justified by the realities of political life and of State interests, the question is how to decide and who is to decide what should and should not come within the Official Secrets Acts. A possible solution to this knotty problem may be found in the following observations of Lord Shawcross. "There are perhaps four categories of cases in which it may be arguable that the public interest justifies a restraint on disclosure: 1. Information prejudicial to the security of the State—for instance, matters relating to defence or police. 2. Information prejudicial to the national interest—matters relating to foreign relations, diplomatic negotiations and, perhaps, matters affecting banking, currency, and commodity reserves so far as they are matters for the State. 3. Information concerning matters of State, for instance, in regard to an impending budget, the premature disclosure of which could provide unfair opportunities

for private financial gain. 4. Information provided to Government Departments in regard to matters of State and on promise of non-disclosure...In regard to these, it is legitimate for the State to forbid disclosure or publication. But how is it to be decided whether a particular matter comes within the scope of one or other of these four prohibitions? Not merely by the *ipse dixit* of the Government Departments concerned. It should be a matter for the Courts to decide. Accordingly, it should be an answer to a charge that some particular publication had infringed the Official Secrets Acts or similar legislation to show that the natural interest or legitimate private interests confided to the State were not likely to be harmed by the publication in question, and that the information was passed and received and published in good faith and in the public interest "

Q. *What is the law relating to the liability of the Crown for contract before the passing of the Crown Proceedings Act, 1947? What is the position now?*

Ans. "By 'the Crown' we mean normally the Queen exercising her legal powers through one of her servants. It is not, however, a technical term of precise signification. It is used sometimes simply as a synonym for the Queen. We can say, for instance that the Prime Minister is appointed by the Crown. It would not be entirely inaccurate to say that the Crown sometimes opens Parliament in person. Nevertheless, the tendency is to use the word 'Queen' in regard to acts which the Queen does personally and the word 'Crown' in relation to acts

which are done by some public authority, but ascribed to the Queen because the power as to act is legally vested in her."

Thus because a minister or a civil servant in the performance of his official duties acts as a servant of the Crown, his action is an act of the Crown. And "since the Crown possesses special immunities, the acts of the central administration are, as such cloaked with special privileges in regard to legal proceedings." That is to say, "the law applying to the Crown and its servant is different from the law applying to private persons, even in respect of civil liability." Of course, in this field, at present the position has been greatly changed by the passage of the Crown Proceedings Act, 1947.

"Formerly it was not possible to ~~see~~ the Crown at all, but where there was a breach of contract by the Crown, there was a remedy known as the 'petition of right'. Theoretically, it was not an action. A petition was submitted to the Home Secretary and if he, after consulting the Attorney-General, decided that the case ought to be investigated by the courts, he issued his fiat, and the case then proceeded as if it were an action by the petitioner against the Crown."

Section 1 of the Crown Proceedings Act, 1947, "provides in effect that any person or body may bring an action in contract directly against a Government except in three types of cases. The exceptions are cases in which the Crown remains privileged from legal actions for damages, or for the recovery of a liquidated sum, or for specific performance and cover contracts dependent upon a future grant of money from Parliament, contracts

which fetter future executive action, and contracts of service with members of the armed forces. Thus...no soldier has the right to sue the Crown for wrongful dismissal or for reduction or arrears of pay. The reason for this is that the armed forces are still under the Prerogative power of the Crown....”

Thus it may be said that as regards the liability of the Crown in contract “the Crown is now much nearer the position of a private contractor, employer or occupier of premises as far as litigation is concerned. To this extent English law has approached more nearly to the concept of the rule of law favoured by Dicey....”

Thus, as has been already noted, “it is not every contract entered into by Crown which gives a right to redress for its breach. Thus, if the contract expressly provides that money payments thereunder are to be made out of monies provided by Parliament, such provision is a condition precedent to liability under the contract, but it is not necessary that specific appropriations shall be made in advance to meet the obligations of the Crown. Any damages awarded against the Crown will, however, only be recoverable if appropriation is made by Parliament in the usual way.” This is because no injunction will lie against the Crown and no litigant can be allowed to force Parliament to grant funds to enable the Government to carry out its contractual obligations. As to the provision that the Crown cannot bind itself so as to fetter its future executive action, the meaning is not quite clear. There is only one case in which an action, under the old petition of

right, was disallowed on this ground (*Rederiakticbolaget Amphitrite v. The King* 1921). "But the defence of executive necessity probably only avails the Crown where there is an implied term to that effect or that is the true meaning of the contract. At all events the defence has no application to ordinary commercial contracts made by the Crown," and the rule of executive necessity is "confined to matters fundamental to the existence and proper government of the community. What these are is a matter for the courts."

Again, "the relationship between the Crown and its servants is unilateral and does not give the servant a right of action for dismissal." Civil servants also may be dismissed at pleasure unless otherwise provided statutorily. As was said in *Dunn v. The Queen*, "Such employment being for the good of the public, it is essential for the public good that it should be capable of being determined at the pleasure of the Crown, except in exceptional cases where it has been deemed to be more for the public good that some restriction should be imposed on the power to dismiss its servants." However, in *Reilly v. The King*, it was said that "a term would not be implied that the Crown could dismiss at pleasure if the contract prescribed the period of employment and provided expressly for dismissal for cause,"

Finally, "No remedy exists where an officer appointed under statutory authority loses his office through its premature termination by an Act of Parliament without compensation, since the agreement has become impossible of performance. Members of the armed forces cannot sue for arrears of pay, for no engagement between the

Crown and members of armed forces can be enforced by a court of law.

Finally, it must be noted that there are a number of special rules applicable to Crown proceedings and these rules operate as limitations on the liability of the Crown. These limitations are both substantive and procedural in suits against the Crown as well as limitations on remedies against the Crown. As regards substantive limitations, two points may be made. First, as a rule "a statute does not bind the Crown unless a clear intention to that effect appears from the statute itself or from the express terms of the Crown Proceedings Act, 1947," "Some post 1947 Acts such as the Occupiers' Liability Act, 1957, have been made expressly binding on the Crown." And secondly, "Estoppel by deed does not bind the Crown, at least when the Crown is deceived in its grant. Estoppel by record and estoppels by conduct bind the Crown."

About the procedural limitations, three points may be mentioned. First, the Crown enjoys what is called the Crown privilege which enables it to withhold the production of documents if to do so is deemed contrary to the public interest. "This principle on which *Duncan v. Cammell Laird and Co. Ltd.* is the leading case, is confirmed by the Crown Proceedings Act. The head of the appropriate department is the sole arbiter of the public interest here...It has recently been confirmed that public authorities other than the Crown do not possess this privilege." Secondly, the Crown has the right of choice of venue and also the right "to demand a trial at bar before a Divisional Court of the Queen's



**Bench Division.**” And thirdly, “Judgments against the Crown cannot be enforced either by execution or attachment.”

Finally, as regards the limitations on remedies against the Crown, the Crown Proceedings Act, 1947, does not alter the common law rule of non-applicability of *mandamus* to the Crown or its servants. Injunction also does not lie against the Crown. “The Crown Proceedings Act provides that only a declaratory judgment in lieu of an injunction may now be granted against the Crown or its officers as representing the Crown.”

To conclude, the fact that the Crown is now liable in contract as well as in tort, however imperfectly, shows clearly that the United Kingdom also cannot refuse to accept what many other countries have already accepted namely, that administrative bodies should be made subject to a uniform body of public law, administered by administrative Courts, a body of law separate from that controlling private persons. “English judges are plainly desirous of evolving fair principles of administrative liability but are circumscribed by their adherence to private-law concepts.”

**Q.** *Describe the law and practice regarding the suspension of habeas corpus during emergencies in England.*

**Ans.** The writ of *habeas corpus* is universally regarded as the most important weapon of defence for the oppressed. The great jurist Blackstone explains it thus. The great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*, directed to the person detaining another, and commanding

him to produce the body of the prisoner, with the day and cause of his caption and detention,...to do, submit to and receive whatsoever the judge or the court awarding such writ shall consider in that behalf. Another authority says "This great constitutional remedy rests upon the common law declared by Magna Carta and the statutes which affirm it, which rest, likewise, on specific enactments ensuring its efficiency, extending its applicability, and rendering more firm and durable the liberties of the people...and the right to claim it cannot be suspended, even for one hour, by any means short of an Act of Parliament."

An applicant for the writ must allege that he or the complainant is being unlawfully detained, whether it be for a criminal or civil offence, or for no offence at all.... A *prima facie* case must be made out before the writ will issue, but if a superior court or judge grants the issue of the writ, the effect is to cause the alleged captor to bring the body of the prisoner before the judge, who will then decide on the merits of the case whether there is any legal ground for continuing to detain him. If no such legal ground is found to exist, the applicant is set free by the Court.

Now, in all countries during an emergency the government of the day comes to be invested with large amounts of special powers which make short work of the usual liberties and their safeguards. In England, emergency is of two types, that caused by war and that caused by internal factors of similar importance and magnitude. Taking the second kind of emergency, the position may be described as follows.

Formerly, the executive used to claim and often exercise the power to "legislate independently of Parliament by virtue of necessity," but the Emergency Powers Act, 1920, permitting "a modified form of rule by regulation in the event of emergency" to be declared by the Executive, provides for parliamentary control.

While the power to declare a state of emergency lies with the Executive, circumstances in which it can do so may be described thus : action must have been taken or threatened which is calculated to deprive the community or any substantial portion of it, of the essentials of life by interfering with the supply and distribution of food, water, fuel, or light or with the means of locomotion. The state of emergency is declared by proclamation, which can only remain in force for one month, though in practice the period may be continued by the issue of a new proclamation. The proclamation must be forthwith communicated to Parliament. If Parliament is not sitting, it must be summoned within five days. So long as the proclamation is in force, regulations may be made by Order-in-Council for securing the essentials of life to the community." While the Executive comes during an emergency to wield extra-ordinary powers "for the purpose of preserving peace, or for securing and regulating the supply and distribution of necessities and maintaining the means of transport," it, however, cannot under these powers impose compulsory military service or industrial conscription nor can it interfere with the right to strike and the right to peacefully persuade others to do. And the most important point to note is that the

The Emergency Powers Act "does not suspend the writ of *habeas corpus* and expressly prohibits the alteration of any existing procedure in criminal cases or the conferring of any right to punish by fine or imprisonment without trial."

And during an emergency caused by war, the position may be described as follows. Faced with an overwhelming threat to independence, integrity and the very existence, even a democracy does not hesitate to confer large powers to the government of the day to enable it to deal effectively with the challenge. Formerly, the practice was to suspend the writ of *habeas corpus* through Habeas Corpus Suspension Acts which enabled the authorities to detain persons without arranging for speedy trial or granting of bail. But the writ was only put in abeyance and as soon as the period specified in the Suspension Act was over, persons denied the benefit of *habeas corpus* during the period in question could bring action for false imprisonment or malicious persecution. "Suspension did not legalise illegal arrest; it merely suspended a particular remedy in respect of particular offences."

Thus to escape the consequences of such actions, the usual practice was the passing of Indemnity Acts at the close of the period of suspension. The whole purpose of these Acts was to protect the officials concerned from the consequences of any incidental illegal acts which they might have committed under cover of the suspension of the writ. That is to say, the first enables the government to take politically necessary but legally irregular steps and the other legalises all such irregularities. The

two thus go together, the latter supplementing the former.

During the World War I, however, it was not found necessary to directly suspend the operation of the writ because the Defence of the Realm Acts 1914-15 were found to provide ample power enabling the Executive to make regulations by Order-in Council for securing public safety or for the defence of the realm, including regulation for arrest and detention without trial. For example, in *The King v. Halliday, ex parte Ladig*, the House of Lords decided by a majority opinion that "on the construction of the Act the executive held unrestricted powers." Thus any regulation providing for almost unlimited power to arrest and detain was valid. Not even an indemnity act was necessary because there was no scope for challenging the merits of detention, though after the war, the Indemnity Act, 1920 and War Charges Validity Act, 1925 were passed to cover all eventualities.

During the World War II, the Emergency Powers (Defence) Act, 1939 authorised the making of regulations by Order-in-Council which appeared necessary or expedient for the public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of any war in which His Majesty might be engaged and the maintenance of supplies and services essential for the life of the community. Regulations could also be made for other purposes such as the trial of offenders against the regulations, the detention of persons by the Secretary of State in the interests of public safety or the defence of the realm, for entering

and searching any premises, etc. All regulations, however, had to be laid before Parliament as soon as possible after their making and could be annulled by a negative resolution of Parliament within twenty-eight days. But the important point to be noted in this connection is that "orders made on the authority of Defence Regulations were not subject to any special form of parliamentary control."

But even during the operation of these regulations, the right of access to courts remained intact, though the Courts could not question the necessity or expediency of the regulations. The Courts were not wholly powerless, however, having the power to declare an act "illegal as being not authorised by the regulation relied upon to justify it."

The authority which Parliament had given to the Executive to arrest and detain persons without trial was exercised under regulation 18B, the most important of all the regulations having anything to do with personal liberty. This regulation 18B empowered the Home Secretary to detain anyone whom he had reasonable cause to believe came within specified categories of suspects and that by reason thereof it was necessary to exercise control over him. There was to be an Advisory Committee appointed by the Home Secretary and persons detained by the latter could make objections to the Committee. The Home Secretary had to make a monthly report to Parliament on the number of persons detained and the number of cases in which the Advisory Committee has been overruled by him. The persons detained by the Home Secretary had the right of praying

for the *habeas corpus* writ but it had no chance of being granted. The House of Lords in *Liversidge v. Anderson* gave the opinion that the Courts were powerless in face of the plea that considerations of security forbade proof of the evidence upon which detention was ordered, that it was sufficient for the Home Secretary to have reasonable cause to believe and that the Courts could not go into the grounds of his belief.

After the war, while majority of the regulations relating to defence and to the public safety were repealed, there came the Supplies and Services (Transitional Provisions) Act, 1945 which was very like an emergency regulation and which "enabled legislation by defence regulation to continue for a further period of 5 years and thereafter annually, if both Houses of Parliament so decided by resolution, for the purpose of maintaining, controlling and regulating supplies and services so as to" secure the interest of the Community. In 1947 and in 1951, the scope of this Act was further extended in scope and purpose.

To conclude, so far as the law and practice regarding the writ of *habeas corpus* in England is concerned, we can say that during what may be called a civil emergency, the writ of *habeas corpus* cannot be suspended. And during a war emergency, the modern tendency to leave the writ intact in form but to nullify its operation in practice through the use and application of wide ranging emergency Acts which supplant the objective test in case of arrest and detention by the subjective test of reasonable belief of the Home Secretary for the period of emergency.

28. Q. *Examine the scope and limits of emergency legislation in England.*

Ans. When the nation is faced with an emergency, it is natural for the Executive to be vested with special powers to deal with it. In Britain also, there are constitutional provisions for dealing with an emergency which broadly may be of two kinds, that due to a war and that due to internal facts of similar importance and magnitude. Formerly, the Executive used to claim and often exercised the power to "legislate independently of Parliament by virtue of necessity," but the Emergency Powers Act, 1920 permitting "a modified form of rule by regulation in the event of emergency," to be declared by the Executive, provides for parliamentary control.

While the power to declare a state of emergency lies with the Executive, circumstances in which it can do so may be described thus : "action must have been taken or threatened which is calculated to deprive the community or any substantial portion of it, of the essentials of life by interfering with the supply and distribution of food, water, fuel or light, or with the means of locomotion. The state of emergency is declared by proclamation, which can only remain in force for one month, though in practice the period may be continued by the issue of a new proclamation. The proclamation must be forthwith communicated to Parliament. If Parliament is not sitting, it must be summoned within five days. So long as the proclamation is in force, regulations may be made by Order-in-Council for securing the essentials of life to the community." Thus it may be said that during an emergency, the different government



departments and the police may be given extraordinary powers and these powers are to be used for "the purpose of preserving peace or for securing and regulating the supply and distribution of necessities and maintaining the means of transport." The regulations, however, cannot impose compulsory military service in industrial conscription, and cannot do away with the right to strike or the right to peacefully persuade others to do so. Regulations may provide for the trial by courts of summary jurisdiction of persons guilty of offences against the regulations, subject to maximum penalties."

The regulations are subject to approval by resolution of the two Houses of Parliament which must be obtained within seven days of their being laid before Parliament and without which they cannot continue. "The Act does not suspend the writ of *habeas corpus* and expressly prohibits the alteration of any existing procedure in criminal cases or the conferring of any right to punish by fine or imprisonment without trial."

This Emergency Powers Act, 1920 thus clearly provides enough power in the hands of the Government to deal with any large scale disturbance, during peace time, to the life of the community. But this kind of extraordinary power is clearly demanded by the emergency caused by external factor of which naturally the most important case is that of the war. A modern war naturally makes the Government almost all powerful for the time being, the chief expression of which may be seen in the abandonment of many liberties of the individual such as, say, the right to choose an occupation being waived in favour of the duty of compulsory

military service. The legal position regarding the powers of the Government during a war may be discussed thus.

Formerly, during an emergency caused by war, the practice was to suspend the operation of the writ of *habeas corpus* through the passing of Habeas Corpus Suspension Acts which enabled the detaining authority to detain persons without arranging for speedy trial or granting of bail, as under normal circumstances. But the writ was only put in abeyance and as soon as the period specified in the Suspension Act was over, persons denied the benefit of the writ during the period in question, could bring action for false imprisonment or malicious persecution. "Suspension did not legalise illegal arrest ; it merely suspended a particular remedy in respect of particular offences."

Thus to escape the consequences of such actions, the usual practice was the passing of Indemnity Acts at the close of the period of suspension. The whole purpose of these Acts was to protect the officials concerned from the consequences of any incidental illegal acts which they might have committed under cover of the suspension of the writ. That is to say, the first enables the government to take politically necessary but legally irregular steps and the other legalises all such irregularities. The two thus go together, the latter supplementing the former.

During the world war I, however, it was not found necessary to directly suspend the operation of the writ because the Defence of the Realm Acts 1914-15 were found to provide ample power enabling the Executive to make regulations by Order-in-Council for securing

public safety or for the defence of the realm, including regulation for arrest and detention without trial. For example, in the *King v. Halliday, ex parte Zadig*, the House of Lords decided by a majority opinion that "on the construction of the Act the Executive held unrestricted powers." Thus any regulation providing for almost unlimited power to arrest and detain was valid. Not even an indemnity act was necessary because there was no scope for challenging the merits of detention, though after the war, the Indemnity Act, 1920 and the War Charges Validity Act, 1925, were passed to cover all eventualities.

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"The Emergency Powers (Defence) Act, 1939, expressly forbade the imposition by regulations of any form of compulsory military service or industrial conscription. Compulsory service was imposed by separate National Service Acts. The ban on the imposition by Defence Regulations of industrial conscription was removed by the Emergency Powers (Defence) No. 2 Act, 1940. This Act enabled Defence Regulations to require persons to place themselves, their services and their property at the disposal of His Majesty as might appear to him to be necessary or expedient for any of the general purposes enumerated in the Act of 1939. Defence Regulation 55 made under the Act of 1939 had provided for the control of industry, but not of the labour employed in industry. Under the Act of 1940 the directions under Defence Regulations 58A provided for the transfer of labour from less essential civil work to work more closely connected with the war effort."

But even during the operation of these regulations, the right of access to Courts remained intact, though the Courts could not question the necessity or expediency of the regulations. The Courts were not wholly powerless, however, having the power to declare an act "illegal as being not authorised by the regulation relied upon to justify it."

The authority which Parliament had given to the Executive to arrest and detain persons without trial was exercised under regulation 18B, the most important of all the regulations having anything to do with personal liberty. This regulation 18B empowered the Home Secretary to detain any one whom he had reasonable

cause to believe came within specified category of suspects and that by reason thereof it was necessary to exercise control over him. There was to be an Advisory Committee appointed by the Home Secretary and persons detained by the latter could make objections to the Committee. The Home Secretary had to make a monthly report to Parliament on the number of persons detained and the number of cases in which the Advisory Committee has been overruled by him. The persons detained by the Home Secretary had the right of praying for the *habeas corpus* writ but it had no chance of being granted. The House of Lords in *Liversidge v. Anderson* gave the opinion that the Courts were powerless in face of the plea that considerations of security forbade proof of the evidence upon which detention was ordered, that it was sufficient for the Home Secretary to have reasonable cause to believe and the Courts could not go into the grounds of his belief.

After the war, while majority of the regulations relating to defence and to the public safety were repealed, there came the Supplies and Services (Transitional Provisions) Act, 1945, which was very like an emergency legislation and which "enabled legislation by defence regulation to continue for a further period of 5 years and thereafter annually, if both Houses of Parliament so decided by resolution, for the purpose of maintaining, controlling and regulating supplies and services so as to" secure the interest of the community. In 1947 and in 1951, the scope of this Act was further extended in scope and purpose.

"Thus over a wide field of government legislation by

regulations had in peace-time taken the place of legislation by Bill. In form this type of delegated legislation does not differ from the usual type of ministerial regulation-making power which is the inevitable feature of every major Act. But the general character of the powers were so wide, whereas delegated legislation is normally restricted within defined limits and for relatively narrow purposes, that the consequent relaxation of parliamentary control was significant.... The only concession to parliamentary control was contained in the Supplies and Services Act, 1945, which extended the annulment procedure to all orders and other instruments made under powers conferred by Defence Regulations."

However, most of the remaining Defence Regulations were done away with through the Emergency Laws (Repeal) Act, 1958. A few regulations remained and these provided for control "of industry including price control," imposition of "additional exchange controls," and the employment of members of the Armed Forces "on agricultural and other urgent work of national importance." "The Supplies and Services Acts and the Emergency Laws Act, 1945 to 1951 were repealed. The remaining regulations are to be used for strictly limited purposes ..."

*Q. Examine the case for and against Delegated Legislation*

*Ans* "In the United Kingdom the power to legislate is vested in Parliament at Westminster. This power is supplemented by the adjudicatory function of the law

courts, which apply and interpret Acts of Parliament as may be necessary, but which also follow the rules established by the method of case precedent wherever no statute law is relevant. But there is still another method of lawmaking, known as delegated or subordinate legislation, which stems from the position of Parliament as a sovereign body, even though it is not a manifestation of the direct functioning of Parliament. Whenever an Act of Parliament provides that any Government Department, local authority, the Crown, or any individual or body shall have the power to make regulations or orders that shall have the force of law, that statute is regarded as laying down a method of creating delegated legislation, and any regulations or orders made under such powers take effect as if part of the parent Act, provided that they conform to the limitations expressed in that parent Act." In other words, delegated legislation is legislation not by an Act of Parliament but by Orders-in Council, Orders, Warrants, Regulations and Rules and has been a part of the parliamentary system for at least six hundred years. Parliament, however, made but sparing use of the power to delegate legislation, (except during a period of social, political and economic change in the second half of the fifteenth and most of the sixteenth centuries) until end of the nineteenth century when a changing idea of the part to be played by the State in the life of the community made inroads upon parliamentary time and made the system to be adopted on a more extensive scale. With the everincreasing scope of government activity in various fields of the

life of the community during the last fifty years and more, pressure on parliamentary time has been still more acute, and as a result the system of delegated legislation has become generally accepted and at present there are very few Acts of Parliament which do not contain provisions for its use.

In this connection, the distinction between "delegated legislation" and "subordinate legislation" may also be explained. "The term "subordinate legislation" really includes law-making under the power of the Royal Prerogative as where the Crown legislates by Proclamation or Order-in-Council for newly conquered or ceded Colonies. But delegated legislation, properly so called, may only be created under statutory powers, .. Nevertheless, whether the authority for subordinate legislation be, in any particular instance, a statute or the Royal Prerogative, the person or body empowered to create the subordinate legislation is usually a part of the Crown. and thus the law concerning the effect and control of this legislation is administrative law. It may also be noted in passing that, the case of delegated legislation, the parent Act may provide for sub-delegation of powers conferred, but that sub-delegation is only lawful if expressly or implicitly authorised by the enabling Act."

The advantages of a system of delegated legislation which empowers ministers and other authorities to regulate administrative details after a Bill has become an Act, may be put thus :

1. It shortens and clarifies Bills before Parliament, thus enabling it to deal with a greater volume of



business and to give fuller attention to matters of policy and principle which are its primary concern.

2. It encourages flexibility, for administrative details can be worked out as and when the necessity arises, with greater care and minuteness and with better adaptation to local and special circumstances than they can possibly be during the passage of a Bill through Parliament.

3. It is invaluable in an emergency, for, it is the means by which the legislature can dispense with its own deliberative procedure and arm the executive with powers to take immediate action.

4. It provides a speedy, convenient and accurate means of giving effect to the policy of Parliament.

In short, "the advantages of delegated legislation from the point of view of the Government are those of speed, especially in emergencies or in war-time the ability to deal with a technical subject-matter without having to explain the whole issue painstakingly to Parliament, and flexibility, in that regulations may be made, altered or rescinded as and when it is thought appropriate and without unnecessary delay "

"In effect it is open to Parliament to create any delegated legislative power it wishes, in whatever form and vest in whatever person or body it cares, for this is a power implicit in the sovereignty of Parliament. For example, it has sometimes conferred a power to impose taxation, or even to modify or adapt the parent Act or other Acts of Parliament, though Parliament will not normally do this without good reason. The most usual types of delegated legislation which have

been provided for by statutes in the past can be tabulated without great difficulty and there is no reason to believe that Parliament will wish in the future to depart from its established practice. The main varieties are : (1) Local authority bye-laws..... (2) Public corporation byelaws ..... (3) Rules of the Supreme Court and the County Court, etc... (4) Ministerial or Departmental regulations .. (5) Orders made by the Monarch-in-Council." Of these main varieties, those falling under (4) and (5) are the most important. Again, while the orders made by the Monarch-in-Council are "similar in nature to Ministerial or Departmental regulations, but they are generally of wider national importance and the authority for their creation may stem from the Royal Prerogative as well as from Parliament."

But though the system of delegated legislation has many advantages, it has not escaped criticism and some of the more important points of criticism may be put as follows.

First, delegated legislation clearly constitutes a "threat to parliamentary government if power is delegated to legislate on matters of general policy, or if so wide a discretion is conferred that it is impossible to be sure what limit the legislature intended to impose."

Secondly, the delegation of the power of imposing taxation has been particularly criticised on the ground of the vital connection between Parliament's power of imposing taxation and its legal supremacy.

Thirdly, the practice of sub-delegation of the power

to legislate has also attracted much unfavourable comments. For example, the Emergency Powers (Defence) Act, 1939, S. 1 (3) states that "Defence Regulations may provide for empowering such authorities, persons or classes of persons as may be specified in the Regulations to make orders, rules and byelaws for any of the purposes for which the Regulations could be made.....On occasions this has resulted in legislative action at four moves from the parent Act, as when general licences were authorised under directions issued, which directions were given under the authority of orders made under a Defence Regulation which in turn was made under the Act of 1939. Action at four removes from the direct authority of Parliament has been condemned as tending to postpone the formulation of an exact and definite law and as encouraging the taking of powers meanwhile in wider terms than may ultimately be required."

Fourthly, retrospective operation of some delegated legislation is also severely criticised. "To change the character of past transactions carried out on the faith of the then existing law is repugnant to the conception of the rule of law." If, under compelling circumstances, this is to be done at all, "this should be done by Parliament itself....and not entrusted to delegated legislation, where there is no procedure apt for securing amendment of the new law."

Fifthly, there is criticism against what is called Henry VIII clause enabling a Minister to modify the Act itself so far as necessary for bringing it into operation.

In short, the practice of delegated legislation has been

viewed with grave concern as a treat to constitutional government. This feeling of concern has received a most vigorous expression in the *New Despotism* of Lord Chief Justice Hewart (1928). In 1929, a Committee was set up under the chairmanship of the Earl of Donoughmore to look into the whole question. This Committee came to the conclusion that delegated legislation is "legitimate for certain purposes, within certain limits, and under certain safeguards." It proceeded to make a number of detailed recommendations designed to provide the limits and safeguards deemed desirable. Most of these have been accepted and operate to-day as part of the system.

In order to minimise the risks inherent in the system of delegated legislation, that delegated legislative powers might not supersede or weaken parliamentary government, such powers are normally delegated to the King-in-Council, or to authorities directly responsible to Parliament, to Ministers of the Crown, to Government Departments for which Ministers are responsible or organisations whose legislation is subject to confirmation or approval by Ministers who thereby become responsible to Parliament for it. Moreover, the Acts of Parliament by which particular powers are delegated frequently provide for some measure of parliamentary control over the legislation made in exercise of them. There are cases in which an instrument must be approved by Parliament or the House of Commons before it can have permanent operation or in which Parliament or the House of Commons can secure the annulment of an instrument by a resolution passed within a certain number of days of the instrument being laid before it

and others in which drafts of proposed instruments must be laid before Parliament or the House of Commons before they are made and must then be subject to either an affirmative or negative resolution.

As a further safeguard, the parent Act generally defines the precise limits of delegated legislative powers and if these limits are surpassed, the courts can be moved to declare that the action taken is *ultra vires*. Certain Acts also require direct consultation with organisations which will be affected by delegated legislation before the making of such legislation. "Again, the Statutory Instruments Acts, 1946, provides that all statutory instruments shall be published by the Stationery Office after they have been made. Where any statutory instrument is required to be laid before Parliament after being made, the published copies must contain the date on which it came or will come into operation,...any person charged with an offence under a statutory instrument has a good defence if he can prove that the instrument had not at the time of the offence been published by the Stationary Office, unless reasonable steps had been taken to bring the instrument to the notice of the public, the person charged or persons likely to be affected by it."

To conclude, while it is true, as some argue, that real danger lies in volume and character of delegated legislation, that it can invade and some say, has already invaded the sphere of Parliament, that no standardisation of practice or the use of procedural device can alter the fact that delegated legislation essentially threatens the principle of sovereignty of Parliament and Rule of

Law, at the same time it has to be accepted that the criticisms can only be met by abandoning the practice altogether, there being and the critics being unable to suggest any safer alternatives. Thus the danger and the necessity must both be accepted. And in the circumstances the remedy, if any, lies in the hands of Parliament itself which can at anytime withdraw the powers it has delegated.